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The Power of the Governor General of the Philippine Islands to Deport or Expel Aliens

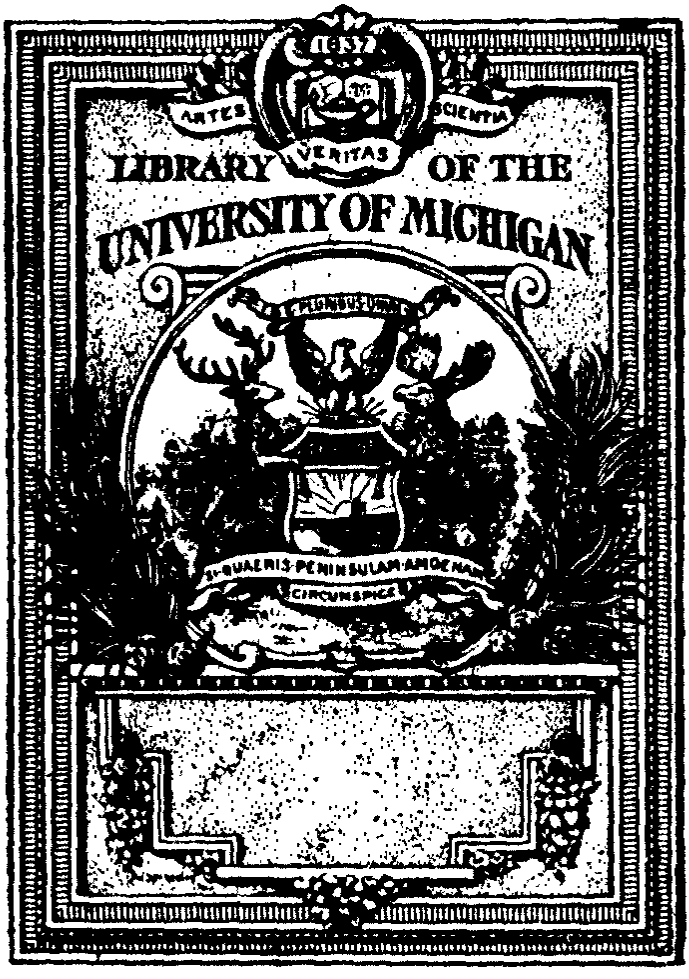
By

C. A. DeWitt,

of the Manila Bar

With compliments

C A DeWitt



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THE AUTHOR

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78

The Power of the Governor General of the Philippine Islands to Deport or Expel Aliens.

STATEMENT OF FACTS

On August 19, 1909, the Chiefs of the Police and Secret Service of the city of Manila, acting under the orders of the Governor-General of the Philippine Islands, seized and deported twelve persons of Chinese race and descent. Among the persons so deported were the following:

CHOUCO TIACO (a) CHOA TEA. This man has been a resident in the Philippine Islands for the last 29 years. He worked as a laborer in the Philippine Islands during the first five years of his residence and then established a soap factory in Calle Santo Cristo in the city of Manila. He is now the owner of this factory and the building in which it is operated. He is also the owner of a warehouse in Aparri, and is interested in a slipper or chinela business in Calle Santo Cristo in connection with others. He also conducts a retail shop in connection with his soap factory.

SY CHANG. This man is 56 years of age and has been a resident of the Philippine Islands for the last 29 years. He came to the Philippine Islands as a baker and worked in that capacity for two years. He acquired considerable property and was the proprietor of three Chinese merchandise stores in the town of Caloocan. He also acquired a wine business but all his property was lost during the revolution. He has been married for the last 18 years to a native woman in the Philippine Islands and has had by her three daughters.

DY TOCO. This man has been a resident of the Philippine Islands for the last 25 years and married here about seven years ago. He was associated with his brother in a furniture store in Calle San Jacinto, in the city of Manila.

SY QUIO. This man has been a resident of the Philippine Islands for the last 24 years and has been married

here for the last 10 years. He was the proprietor of a rice store in Calle Tetuan, in the city of Manila, for a period of 14 years.

AGAPITO UY TONGCO. This man has been a resident of the Philippine Islands for a period of 35 years. He became a Christian 28 years ago and married a native woman in 1885, by whom he has had a family of three or four children. Upon arriving here he became a collector for a period of about one year and afterwards he became the manager of a distillery in Hagonoy. He was for 28 years the managing partner of that business. He also went into partnership with a Chinaman named Sy Sip in 1903 in a contract with the Spanish firm of Ynchausti and Company. He was one of the directors of the Chinese Gremio during the Spanish regime and in 1896 was given a special certificate of merit by the Spanish Government for services rendered them in putting down the insurrection of that year. In 1907 he was elected president of the Chinese Chamber of Commerce of the city of Manila. He is the owner, with his wife, of considerable real estate in the province of Bulacan, acquired during his marriage.

SIXTH. GAN TICO. This man is 33 years of age and reached the Philippine Islands in 1894. He has a shop in which he is engaged in the purchase and sale of sacking.

The deportation was carried into effect as follows:

Between 8:00 and 9:00 o'clock of the evening of the 19th of August, 1909, the Secret Service authorities of the city of Manila, without warrant, arrested these twelve men and took them to the Luneta Police Station, where the Secret Service authorities have their headquarters. There the deportees were deprived of their certificates of registration and the other documents required of a Chinese person under the laws in force in the Philippine Islands, and were then placed in a patrol wagon and hurried to the water front where a launch was waiting to take them on board ship. They were thrown into the launch and were immediately taken out to the S. S. "Yuensang", which had been held for some hours after its regular sailing hour so that the deportation could

be accomplished under the cover of darkness and after the courts of justice had closed. As soon as the deportees were placed on board, the boat left for Amoy, China, where the deportees were landed. In spite of the fact that it has been alleged that the deportation was carried out at the instance of the representatives of the Chinese Government in the Philippine Islands, no action was taken in China against them. Upon reaching Amoy, they were allowed to come and go at will. A few days after the deportation was carried out the Governor-General of these Islands, thru the columns of the local press, declared that it had been carried out under his orders and that he assumed full responsibility therefor.

The men who were thus deported were never given an opportunity to bid farewell to their families or to make any arrangement whatsoever in regard to their business affairs. They were never notified that any such drastic action as that taken was contemplated by the Chief Executive of these Islands. They were never notified that any charges or accusations of any character had been filed against them with the Chief Executive of these Islands by any person whatsoever. At the time that they were arrested they were not notified as to the motive or purposes of the arrest and were not notified as to what was being done to them. They have never been given an opportunity, either before or since the deportation, to appear before the Chief Executive of these Islands or any of his agents or subordinates, to be informed of such charges as may have been made against them and to answer the same and to present evidence in their own behalf as to such charges. As a matter of fact, an active effort has been made in their behalf to secure definite information from the Chief Executive as to what the charges against them are, if any, and under various pretexts this information has been steadfastly withheld.

On the 29th day of Mach, 1910, six of the deported Chinese, those who are described in the foregoing, succeeded in returning to Manila and habeas corpus proceedings were at once begun in the Court of First Instance of the city of

Manila to secure to them their liberty. Under these proceedings the court took them into its custody and held them until the Immigration authorities should first pass on their right to land. On the following day while the men were still in the custody of the court the Governor-General of these Islands sent a telegram to the Chinese Consul General of the city of Manila as follows:—

"Your telegram has been received. Have directed that the deported Chinese be sent away again.

FORBES."

This telegram was published in the daily papers of the city of Manila on the 31st day of March, 1910. Upon the receipt of this telegram an action was instituted in the Court of First Instance of the city of Manila against the Governor-General of the Philippine Islands, the Chief of Police and the Chief of the Secret Service of the City of Manila, on behalf of the six Chinese, praying for damages for their former deportation and for an injunction to restrain the defendants and their agents and subordinates from carrying into effect the threatened redeportation.

When the cases came on for hearing before the immigration authorities three of the six deportees were landed as members of the exempt class. In the cases of the other three, one of the members of the Board of Special Inquiry appealed from the majority decision in favor of their landing, and subsequently thereto, his appeal was sustained by the Collector of Customs. As to the three who were first landed the petition for a writ of habeas corpus was dismissed and a preliminary injunction issued in the civil actions to restrain the Governor-General of the Philippine Islands, the Chief of Police and the Chief of the Secret Service of the city of Manila from carrying out the threatened redeportation. Subsequently thereto, the defendants in these three cases appeared and demurred to the complaints on the ground that the Court had no jurisdiction to entertain the actions. The demurrers were overruled and thereupon, instead of answering, the defendants made application to the Supreme Court of these Islands for a writ of prohibition to restrain the Court of First Instance from proceeding with the cases. Pre-

liminary injunctions were issued from the Supreme Court in the prohibition cases and upon demurrer these injunctions were made permanent and the writ of prohibition was ordered issued. As to the three deportees who were refused landing by the Collector of Customs, the habeas corpus proceedings were continued and the writ was issued in their behalf by the Court of First Instance of the City of Manila. The Government appealed from this decision to the Supreme Court of the Philippine Islands but later withdrew the appeal. Thus, the six returning deportees were finally landed.

While the three cases were pending decision on demurrer in the Court of First Instance and on the 18th day of April, 1910, during the last session of the Philippine Legislature at Baguio, the Governor General sent to the Legislature a message designating the deportation cases as proper matter for their consideration. This message was as follows:—

"OFFICE OF THE GOVERNOR-GENERAL OF THE PHILIPPINE ISLANDS.

Baguio, April 18, 1910.

TO THE PHILIPPINE LEGISLATURE:—

In the exercise of the power vested in me by Congress, as Chief Executive of the Philippine Islands, I had occasion, on or about the nineteenth of last August, to cause the deportation of certain Chinamen whose antecedents, character and conduct were such that said Chinamen were recognized as being undesirable, troublesome and dangerous even by the Chinese Chamber of Commerce, to such an extreme that the deportation of the aforesaid Chinamen was then urgently requested by the representative of His Imperial Chinese Majesty, the Emperor of China, namely, the Chinese Consul-General resident in Manila. After careful investigation I found that the allegations were reasonable and that the presence of the said persons of Chinese nationality in the Philippines was not only liable to result in serious harm to the Chinese colony

but that it might, and as the investigation showed, did constitute a serious menace to public order and to the well-being of the whole community over which I, as Chief Executive, am called to watch.

Although I have no doubt as to my power in the matter, I believe that whereas the Legislature is in session and the matter is of certain importance, it would be good policy to submit it to both Houses of the Legislature in order to give them thus ample opportunity to express their opinion and sanction the proceeding with regard to the exercise of this power, if such is their desire.

I therefore designate the deportation of such Chinese and the power to deport them, in this case and in others, as one of the subjects which may be considered at the present special session of the Legislature.

Respectfully,

(Sgd.) W. CAMERON FORBES,
Governor-General."

In response thereto, the Philippine Legislature perpetrated the following somewhat remarkable legislative pleasantry:—

"ACT No. 1986. An Act confirming the action of the Governor-General in deporting from the Philippine Islands by request of the Imperial Chinese Consul on August 19, 909, certain persons of Chinese nationality.

Whereas, the Governor General has recently, at the request of the representative of the Chinese government and IN THE EXERCISE OF THE AUTHORITY VESTED IN HIM BY LAW, authorized the deportation from the Philippine Islands of 12 alien Chinese subjects of the Emperor of China after careful investigation and after being convinced by the result of said investigation that the presence of the said individuals in the Philippine Islands might result in serious harm to the Chinese colony and constitute a serious danger to the public tranquility and welfare and

Whereas, the Governor General has sent a message to the legislature setting forth the facts in regard to the matter.

Therefore by authority of the United States be it enacted by the Philippine Legislature that:

Sec. 1. The action of the Governor General in deporting from the Philippine Islands at the request of the Imperial Chinese Consul on or about the 19th day of August, 1909, the twelve persons of Chinese race and subjects of the Emperor of China IS HEREBY APROVED AND RATIFIED AND CONFIRMED AND IN ALL RESPECTS DECLARED LEGAL AND NOT SUBJECT TO QUESTION OR REVIEW.

Sec. 2. The public good requiring the speedy enactment of the bill, the same shall take effect on its passage in accordance with Sec. 1, Act numbered 1945 of the Philippine Legislature, entitled 'an act providing the time at which all acts of the Philippine Legislature shall take effect'."

"Enacted April 19, 1910."

A copy of this Act was filed with the pending cases before Judge Crossfield, of the Court of First Instance of Manila, on or about the 28th day of April, 1910, together with a communication signed by Wm. H. Donovan, Secretary of the Philippine Commission, as follows:—

"Baguio, April 28, 1910.

Sir:

I have the honor to forward herewith for your information copy of Act No. 1986, passed by the Second Philippine Legislature at its recent special session.

(Signed) Wm. H. DONOVAN,
Secretary, Philippine Commission.

HON. A. S. CROSSFIELD,
Judge Court of First Instance,
Manila, P. I."

Since the question of the validity of these acts of deportation has been at issue in the courts of these Islands, the Chief Executive, thru his counsel, has taken the position that among the powers which he possesses as Chief Executive is the power to deport obnoxious aliens, and, in the absence

of legislation defining the conditions under which the power is to be exercised and the procedure to be followed, that he may exercise the same whenever he sees fit and that any procedure which he may adopt in the exercise of the power is due process of law. His position has been expressed as follows:

> "It has never been denied, in a government of separate and independent departments, executive, legislative and judicial, that the legislature may prescribe the methods or conditions for the exercise of of the power, but the mere absence of such rules neither proves that the power does not exist nor that the executive head of the government may not adopt for himself such methods as he may deem advisable for the public good. He can only be controlled in the conditions and methods when and how the powers shall be exercised. The right itself can not be destroyed or bartered away. When the power is once created and no rules are adopted for its enforcement, the person or authority who has to exercise such power has the right to adopt such sane methods for carrying the power into operation as prudence, good judgment, and the exigencies of the case may demand, and whatever rules and regulations for the carrying into operation this inherent power of the government may be adopted, whether they are prescribed or not, will constitute due process of law."

Before entering upon the body of our argument, we beg to emphasize certain features included in the position taken by the Chief Executive.

First. He admits that his power to act in the premises is limited to aliens.

Second He insists, however, that he can determine the jurisdictional fact of alienage without giving the person interested notice or an opportunity to be heard and to present evidence in his own behalf on the question of alienage or citizenship.

THIRD. He insists that he has jurisdiction to determine the occasion when the power shall be exercised, or, in other words, to determine the necessity for the exercise of the power, and this without notice and an opportunity to appear, defend, and present evidence in their own behalf on the part of the persons to be deported.

FOURTH. He likewise insists upon the power to determine the facts in each particular case without notice to the parties to be deported, without giving them an opportunity to appear and defend themselves or to present evidence in their own behalf.

It is very apparent, if the position taken by the Chief Executive of these Islands is sound, that all the inhabitants of the Philippine Islands, including transient aliens, domiciled aliens, and citizens hereof, remain here and hold their property at the sufferance of our Chief Executive. This necessarily follows from the proposition that he may determine that any person whomsoever is an alien without giving that person a hearing and an opportunity to present evidence regarding the facts upon which the question of citizenship or alienage depends. It also follows from the propositions that he may determine what charges or accusations are essential to the exercise of this remarkable power and that he may determine the truth or falsity of such charges or accusations, however secretly made, without giving the person against whom they have been made an opportunity to appear and defend and present evidence in his own behalf, and in fact without notifying him at any stage of the proceedings that such an action is or has been contemplated.

ARGUMENT

EVERY SOVEREIGN STATE HAS THE POWER TO DEPORT OR EXPEL ALIENS FROM THE TERRITORY WITHIN WHICH IT IS SOVEREIGN.

It must be conceded that every sovereign state has the right to deport or expel aliens from the territory within which it is sovereign. If such were not the case, the state to that

extent would not be sovereign. This is a statement of a principle of international law, a rule recognized by sovereign states as obligatory in their relations with each other and with each other's subjects. In other words, the exercise of the power of expulsion by one sovereign state of the subjects of another, although under certain circumstances an extremely unfriendly act, can not be regarded as an invasion of the rights of the other state under the principles of law governing independent sovereign states in their relations with each other. L. Oppenheim—International law, Vol. 1, Sec. 323, 324, 325; Taylor—International Public Law, p. 231; Moore—International Law Digest, Vol. 4, p. 67; Otolan—Diplomatic de la Mar, Book 2, Chapter 14, 4th Ed., p. 297; Chae Chan Ping vs. United States, 130 U. S., 581; Fong Yue Ting vs. United States, 149 U. S. 698; Japanese Immigrant Cases, 142 U. S. 651, 659.

It must be conceded under these authorities that if the sovereign state in the Philippines sees fit to expel foreigners or aliens living within the boundaries of its territorial jurisdiction, that the principles of international law do not admit of any complaint for this action on the part of any of the other members of the family of nations.

It is our contention in this case, however, that the sovereign state in the Philippines never ordered the expulsion of the persons who were subjected to the deportations described in the foregoing statement of facts; otherwise, of course, these deportees would have no standing whatsoever in the courts of the United States in the Philippines, the sovereign state which caused and brought about their deportation. It is our contention that the will of the sovereign state in these matters of deportation manifests itself thru the municipal law in force within the state. If any persons within the state, whether private persons or officers of the government, undertake to deport aliens without the authority of the state as manifested and expressed by its municipal law or in violation of the sovereign will of the state as contained and expressed in its municipal law, then their acts are not the acts of the state in any sense, and they cannot possibly justify under the authority thereof. They

must respond personally for the damages they may have caused the individuals subjected to their wrongful acts. This brings us to our second proposition.

WHAT IS THE WILL OF THE SOVEREIGN STATE IN THE PHILIPPINE ISLANDS AS CONTAINED AND EXPRESSED IN ITS MUNICIPAL LAW IN REGARD TO THE DEPORTATION OF ALIENS?

It has been conceded by counsel for the Governor-General in the argument of these cases that the ultimate depository of sovereignty in the Philippine Islands is in the people of the United States of America. From the very nature of things this must be true. By virtue of Article 3 of the Treaty of Paris of the 10th of December, 1898, Spain ceded to the United States the Archipelago known as the Philippine Islands. In Articles 8, 9, 10, 11, 12 and 14 of this treaty the words "ceded sovereignty" are used. Sovereignty in the United States is vested in the people thereof. The result is that when Spain transferred the sovereignty of the Philippine Islands to the United States the people of the United States acquired sovereignty over the Philippine Islands. Scott v. Sanford, 19 Howard, 393, 448.

The people of the United States, as the sovereign of the Philippine Islands, have the inherent power to deport or expel therefrom any and all aliens. This power is, as we have seen, a necessary incident to the fact of sovereignty. It follows that if the acts of deportation set forth in our statement of facts are to be considered as acts of the sovereign state in the Philippine Islands, in other words, as acts of the American people in the Philippine Islands, there must be an expression of their sovereign will authorizing expressly or impliedly these deportations. This brings us to a consideration of the question as to how the American people express their sovereign will in territory belonging to the United States.

When the American people, acting in their sovereign capacity, ordained and established a constitution for the United States of America, they provided in Article 6 thereof that that constitution and the laws of the United States made in pursuance thereof, and all treaties made or which should

be made under the authority of the United States, should be the supreme law of the land; and that the judges in every state should be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. By that instrument the sovereign American people provided themselves with machinery for their self government, expressly delegating to a central or federal government certain of the powers or attributes of sovereignty, and reserving to the states those not delegated thereby to the central government nor prohibited thereby to the states. Article 10, Amendments. In order to provide the machinery necessary for the carrying out of such of the functions, powers, or attributes of sovereignty as were delegated to the central or federal government by this constitution, legislative, executive and judicial departments were established, whereby the delegated functions of sovereignty corresponding to each of these departments were to be exercised.

The legislative powers granted to the central government were vested in the Congress of the United States, consisting of a Senate and a House of Representatives. In Sec. 8, the legislative powers conferred upon this Congress are enumerated. In Sec. 9, as well as in various amendments to the constitution, certain limitations are designated and enumerated, beyond which the Congress of the United States cannot act in the exercise of its legislative power. If it attempts so to act, it acts in violation of its organic law. Its act is not the expression of the sovereign will. It is not law. It would be manifestly absurd to hold any act of this creature of the sovereign, in violation of the will of its creator, to be law.

The executive power is vested in a President of the United States, and he is expressly enjoined to take care that the laws be faithfully executed. Any act of the Chief Executive not authorized by law or in violation of the law, cannot be regarded as an act of the sovereign American people. How can that which is done in violation of the will of the sovereign be regarded as an act of the sovereign?

The judicial power of this central government was by the constitution vested in one Supreme Court and such In-

ferior Courts as Congress might from time to time establish. The duty of these courts is to uphold the Constitution as the supreme law of the land and to prevent or nullify any encroachment thereon or violation thereof by either the executive or legislative departments of the government.

We have now described in a general way that which we call the sovereign in the United States. We have seen that the legislative, executive and judicial departments of the central government are mere agents of the sovereign American people. They are not themselves the sovereign. They merely exercise certain powers, functions or attributes of sovereignty, expressly or impliedly conferred upon them by the sovereign thru the constitution. The state is one thing, its government is another. The government of a state is the agent thereof and while acting within the powers conferred upon it by its organic law, its acts are the acts of the state. When it exceeds those powers or violates the express inhibitions placed upon its power, then its acts are no longer the acts of the state, and it cannot justify them or defend them on the ground that they are the acts of the state. This thought was never better expressed than by Mr. Justice Matthews in the great case of Poindexter vs. Greenhow, 114 U. S. 285-293, as follows:—

> "It is next objected that the suit of the plaintiff below could not be maintained because it is substantially an action against the State of Virginia, to which it has not assented. It is said that the tax collector, who is sued, was an officer and agent of the State, engaged in collecting its revenue, under a valid law, and that the tax he sought to collect from the plaintiff was lawfully due; that, consequently, he was guilty of no personal wrong, but acted only in an official capacity, representing the State; and, in refusing to receive the coupons tendered simply obeyed the commands of his principal, whom he was lawfully bound to obey; and that, if any wrong has been done, it has been done by the State in refusing to perform its contract, and

for that wrong the State is alone liable, but is exempted from suit by the Eleventh Article of Amendment to the Constitution of the United States which declares that 'The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens of or subjects of any foreign State.'"

After a short examination of the authorities, the court goes on and says:

"The ratio decidendi in this class of cases is very plain. A defendant sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The State is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act. This the defendant in the present case undertook to do. He relied on the Act of January 26, 1882, requiring him to collect taxes in gold, silver, United States treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. THAT, IT IS TRUE, IS A LEGISLATIVE ACT OF THE GOVERNMENT OF VIRGINIA, BUT IT IS NOT A LAW OF THE STATE OF VIRGINIA. THE STATE HAS PASSED NO SUCH LAW, FOR IT CANNOT; AND WHAT IT CANNOT DO, IT CERTAINLY, IN CONTEMPLATION OF LAW, HAS NOT DONE. The Constitution of the United States and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment o

taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefore a wrong. HE STANDS, THEN, STRIPPED OF HIS OFFICIAL CHARACTER, AND, CONFESSING A PERSONAL VIOLATION OF THE PLAINTIFF'S RIGHTS, FOR WHICH HE MUST PERSONALLY ANSWER, HE IS WITHOUT DEFENSE,"

* * * * * * * * * *

IN THE DISCUSSION OF SUCH QUESTIONS THE DISTINCTION BETWEEN THE GOVERNMENT OF A STATE AND THE STATE ITSELF IS IMPORTANT AND SHOULD BE OBSERVED. IN COMMON SPEECH AND COMMON APPREHENSION THEY ARE USUALLY REGARDED AS IDENTICAL; AND AS ORDINARILY THE ACTS OF THE GOVERNMENT ARE THE ACTS OF THE STATE, BECAUSE WITHIN THE LIMITS OF ITS DELEGATION OF POWER, THE GOVERNMENT OF THE STATE IS GENERALLY CONFOUNDED WITH THE STATE ITSELF, AND OFTEN THE FORMER IS MEANT WHEN THE LATTER IS MENTIONED. THE STATE ITSELF IS AN IDEAL PERSON, INTANGIBLE, INVISIBLE, IMMUTABLE. THE GOVERNMENT IS AN AGENT, AND, WITHIN THE SPHERE OF THE AGENCY, A PERFECT REPRESENTATIVE; BUT OUTSIDE OF THAT IT IS A LAWLESS USURPATION. THE CONSTITUTION OF THE STATE IS THE LIMIT OF THE AUTHORITY OF ITS GOVERNMENT, AND BOTH GOVERNMENT AND STATE ARE SUBJECT TO THE SUPREMACY OF THE CONSTITUTION OF THE UNITED STATES AND OF THE LAWS MADE IN PURSUANCE THEREOF. SO THAT, WHILE IT IS TRUE IN RESPECT TO THE GOVERNMENT OE A STATE, AS WAS SAID IN LANGFORD v. U. S., 101 U. S., 341, THAT THE MAXIM THAT THE KING CAN DO

NO WRONG HAS NO PLACE IN OUR SYSTEM OF GOVERNMENT; YET IT IS ALSO TRUE, IN RESPECT TO THE STATE ITSELF, THAT WHATEVER WRONG IS ATTEMPTED IN ITS NAME IS IMPUTABLE TO ITS GOVERNMENT AND NOT TO THE STATE, FOR, AS IT CAN SPEAK AND ACT ONLY BY LAW, WHATEVER IT DOES SAY AND DO MUST BE LAWFUL. THAT WHICH THEREFORE, IS UNLAWFUL BECAUSE MADE SO BY THE SUPREME LAW, THE CONSTITUTION OF THE UNITED STATES, IS NOT THE WORD OR DEED OF THE STATE, BUT IS THE MERE WRONG AND TRESPASS OF THOSE INDIVIDUAL PERSONS WHO FALSELY SPEAK AND ACT IN ITS NAME. It was upon the ground of this important distinction that this court proceeded in the case of Texas v. White, 7 Wall., 700, when it adjudged that the acts of secession which constituted the civil war of 1861 were the unlawful acts of usurping State governments and not the acts of the States themselves, inasmuch as 'the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States'; and that consequently the war itself was not a war between the States, nor a war of the United States against States, but a war of the United States against unlawful and usurping governments, representing, not the States, but a rebellion against the United States. This is, in substance, what was said by Chief Justice Chase, delivering the opinion of the court in Thorington v. Smith, 8 Wall., 1, 9, when he declared, speaking of the Confederate Government, that 'it was regarded as simply the military representative of the insurrection against the authority of the United States.' The same distinction was declared and enforced in Williams v. Bruffy 96 U. S., 176, 192, and in Horn v. Lockhart, 17 Wall., 570, both of which were referred to and approved in Keith v. Clark, 97 U. S., 454, 465.

THIS DISTINCTION IS ESSENTIAL TO THE IDEA OF CONSTITUTIONAL GOVERNMENT. TO DENY IT OR BLOT IT OUT OBLITERATES THE LINE OF DEMARCATION THAT SEPARATES CONSTITUTIONAL GOVERNMENT FROM ABSOLUTISM, FREE SELF-GOVERNMENT BASED ON THE SOVEREIGNTY OF THE PEOPLE, FROM THAT DESPOTISM, WHETHER OF THE ONE OR THE MANY, WHICH ENABLES THE AGENT OF THE STATE TO DECLARE AND DECREE THAT HE IS THE STATE—TO SAY "L'ETAT, C'EST MOI". OF WHAT AVAIL ARE WRITTEN CONSTITUTIONS, WHOSE BILLS OF RIGHT FOR THE SECURITY OF INVIDUAL LIBERTY HAVE BEEN WRITTEN, TOO OFTEN, WITH THE BLOOD OF MARTYRS SHED UPON THE BATTLE FIELD AND THE SCAFFOLD, IF THEIR LIMITATIONS AND RESTRAINTS UPON POWER MAY BE OVERPASSED WITH IMPUNITY BY THE VERY AGENCIES CREATED AND APPOINTED TO GUARD, DEFEND AND ENFORCE THEM; AND THAT, TOO, WITH THE SACRED AUTHORITY OF LAW, NOT ONLY COMPELLING OBEDIENCE, BUT ENTITLED TO RESPECT? AND HOW ELSE CAN THESE PRINCIPLES OF INDIVIDUAL LIBERTY AND RIGHT BE MAINTAINED, IF, WHEN VIOLATED, THE JUDICIAL TRIBUNALS ARE FORBIDDEN TO VISIT PENALTIES UPON INDIVIDUAL OFFENDERS, WHO ARE THE INSTRUMENTS OF WRONG, WHENEVER THEY INTERPOSE THE SHIELD OF THE STATE? THE DOCTRINE IS NOT TO BE TOLERATED. THE WHOLE FRAME AND SCHEME OF THE POLITICAL INSTITUTIONS OF THIS COUNTRY, STATE AND FEDERAL, PROTEST AGAINST IT. THEIR CONTINUED EXISTENCE IS NOT COMPATIBLE WITH IT. IT IS THE DOCTRINE OF ABSOLUTISM, PURE, SIMPLE AND NAKED; AND OF COM-

MUNISM, WHICH IS ITS TWIN; THE DOUBLE PROGENY OF THE SAME EVIL BIRTH.

It was said by Chief Justice Chase, speaking for the whole court in Lane Co. v. Oregon, 7 Wall., 71, 76, that the people, through the Constitution of the United States, 'established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the confederate government, which acted with powers, greatly restricted, only upon the States.' In no other way can the supremacy of that Constitution be maintained. It creates a government in fact as well as in name, because its Constitution is the supreme law of the land, 'anything in the Constitution or laws of any State to the contrary notwithstanding'; and its authority is enforced by its power to regulate and govern the conduct of individuals, even where its prohibitions are laid only upon the States themselves. THE MANDATE OF THE STATE AFFORDS NO JUSTIFICATION FOR THE INVASION OF RIGHTS SECURED BY THE CONSTITUTION OF THE UNITED STATES; OTHERWISE THAT CONSTITUTION WOULD NOT BE THE SUPREME LAW OF THE LAND. When, therefore, an individual defendant pleads a statute of a State, which is in violation of the Constitution of the United States as his authority for taking or holding property to which the citizens assert title, and for the protection or possession of which he appeals to the courts, to say that the judicial enforcement of the supreme law of the land, as between the individual parties, is to coerce the State, ignores the fundamental principles on which the Constitution rests, as contrasted with the Articles of Confederation which it displaced; and practically makes the statutes of the States the supreme law of the land within their respective limits.

When, therefore, by the Act of March 30, 1871, the contract was made by which it was agreed that

the coupons issued under that Act should thereafter be receivable in payment of taxes, it was the contract of the State of Virginia, because, though made by the agency of the government, for the time being, of the State, that government was acting within the scope of its authority, and spoke with its voice as its true representative; and inasmuch as, by the Constitution of the United States, which is also the supreme law of Virginia, that contract, when made, became thereby unchangeable and irrepealable by the State, the subsequent Act of January 26, 1882, and all other like Acts which deny the obligation of that contract and forbid its performance, are not the Acts of the State of Virginia. THE TRUE AND REAL COMMONWEALTH WHICH CONTRACTED THE OBLIGATION IS INCAPABLE IN LAW OF DOING ANYTHING IN DEROGATION OF IT. WHATEVER HAVING THAT EFFECT, IF OPERATIVE, HAS BEEN ATTEMPTED OR DONE, IS THE WORK OF ITS GOVERNMENT ACTING WITHOUT AUTHORITY, IN VIOLATION OF ITS FUNDAMENTAL LAW, AND MUST BE LOOKED UPON, IN ALL COURTS OF JUSTICE, AS IF IT WERE NOT AND NEVER HAD BEEN. The argument, therefore, which seeks to defeat the present action, for the reason that it is a suit against the State of Virginia, because the nominal defendant is merely its officer and agent, acting in its behalf, in its name and for its interest, and amenable only to it, falls to the ground, because its chief postulate fails. THE STATE OF VIRGINIA HAS DONE NONE OF THESE THINGS WITH WHICH THIS DEFENSE CHARGES HER. THE DEFENDANT IN ERROR IS NOT HER OFFICER, HER AGENT OR HER REPRESENTATIVE, IN THE MATTER COMPLAINED OF, FOR HE HAS ACTED NOT ONLY WITHOUT HER AUTHORITY, BUT CONTRARY TO HER EXPRESS COMMANDS. THE

PLAINTIFF IN ERROR, IN FACT AND IN LAW, IS REPRESENTING HER, AS HE SEEKS TO ESTABLISH HER LAW, AND VINDICATES HER INTEGRITY AS HE MAINTAINS HIS OWN RIGHT."

So, whatever is done by the government of the Philippine Islands; or any official or department thereof, whatever is done by the President of the United States or his representative, the Secretary of War, whatever is done even by the Congress of the United States in the Philippine Islands, in violation of the will of the American people in their capacity as the sovereign thereof or without their authority given in such capacity, is not the act of the American people in the Philippine Islands. In other words, it "is not the word or deed of the State, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name."

Among the powers possessed by Congress and expressly delegated to it by the people of the United States in the exercise of their sovereignty is that of "making all needful rules and regulations respecting the territory or property belonging to the United States." Article 4 of the Constitution.

It is under this power, which perhaps would have been inherent in the central government in the absence of the constitutional provision relating thereto, that Congress derived its authority to make rules and regulations for the government of the Philippine Islands.

Whether or not in making the needful rules and regulations for the government of territory belonging to the United States, Congress is subject in the exercise of its powers to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, is thus far, perhaps, an academic question, inasmuch as Congress has never attempted in so legislating to transcend these limitations. We believe however that the authorities, wherever they have touched the question, are unanimous in holding that the powers of Congress in these matters are so limited.

In Murphy vs. Ramsey, 114 U. S. 15, 44, the Supreme Court of the United States, speaking thru Mr. Justice Matthews, said:—

> "The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the Government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself; for it may well be admitted in respect to this, as to every power of society over its members, that it is not absolute and unlimited. * * * * * * The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and National; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States."

And in Mormon Church vs. United States, 136 U. S. 1, 44, the same court, speaking thru Mr. Justice Bradley, after quoting from Murphy vs. Ramsey, as above, stated:—

> "Doubtless Congress, in legislating for the Territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its Amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions."

Cooley in his Principles of Constitutional Law, page 37, says:—

> "The Constitution was made for the States, not for Territories. It confers power to govern Territories, but in exercising this the United States is a sovereign deal-

ing with dependent territories according as in its wisdom shall seem politic, wise, and just, having regard to its own interests as well as to those of the people of the Territories. It is believed, however, that the securities for personal liberty which are incorporated in the Constitution were intended as limitations of its power over any and all persons who might be within its jurisdiction anywhere, and that citizens of the Territories as well as citizens of the States may claim the benefit of their protection."

The same limitation is forcibly stated in discussing the status of the inhabitants of the territory acquired by the Treaty of Paris in the case of Downes v. Bidwell, 182 U. S. 244, 283, in which it is said:—

"WHATEVER MAY BE FINALLY DECIDED BY THE AMERICAN PEOPLE AS TO THE STATUS OF THESE ISLANDS AND THEIR INHABITANTS,—WHETHER THEY SHALL BE INTRODUCED INTO THE SISTERHOOD OF STATES OR BE PERMITTED TO FORM INDEPENDENT GOVERNMENTS,—IT DOES NOT FOLLOW THAT IN THE MEANTIME, AWAITING THAT DECISION, THE PEOPLE ARE IN THE MATTER OF PERSONAL RIGHTS UNPROTECTED BY THE PROVISIONS OF OUR CONSTITUTION AND SUBJECT TO THE MERELY ARBITRARY CONTROL OF CONGRESS. EVEN IF REGARDED AS ALIENS, THEY ARE ENTITLED UNDER THE PRINCIPLES OF THE CONSTITUTION TO BE PROTECTED IN LIFE, LIBERTY, AND PROPERTY. This has been frequently held by this court in respect to the Chinese, even when aliens, not possessed of the political rights of citizens of the United States. Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; Lem Moon Sing, 158 U. S. 538, 547, 39 L. ed 1082, 1085, 15 Sup. Ct. Rep. 962; Wong Wing v. United States, 163 U. S. 228, 41 L. ed, 140, 16 Sup. Ct.

Rep. 977. We do not desire, however, to anticipate the difficulties which would naturally arise in this connection, but merely to disclaim any intention to hold that the inhabitants of these territories are subject to an unrestrained power on the part of Congress to deal with them upon the theory that they have no rights which it is bound to respect."

In United States v. Bull, Vol. 8, Official Gazette, p. 275, the Supreme Court of the Philippine Islands, speaking thru Justice Elliot, said:—

> "In legislating with reference to this territory, the power of Congress is limited only by those prohibitions of the Constitution which go to the very root of its power to act at all, irrespective of time or place. In all other respects it is plenary."

See also:—

Scott v. Sanford, 19 Howard 393, 449;
Hawaii v. Mankichi, 190 U. S. 197;
Kepner v. United States, 195 U. S. 100;
Dorr v. United States, 195 U. S. 138.

The foregoing authorities, therefore, indicate that it is beyond the power of Congress in legislating for an acquired territory to enact legislation that would operate to deprive any person of his life, liberty or property without due process of law. The sovereign American people, in creating Congress, imposed this general limitation upon its legislative power, a limitation affecting its power to act at all, irrespective of time or place. It goes without saying, therefore, that any agency which Congress may create for the government of these territories, is subject to the same limitations as Congress itself, and, even in the absence of an expression of the Congressional will, would be powerless to act legislatively, executively, or judicially in such a way as to deprive any inhabitant of these territories of his life, liberty or property without due process of law.

But as we have already stated, the question is perhaps an academic one. Congress has always hastened to provide

for the protection of life, liberty and property in enacting organic laws for newly acquired territories by prohibiting interference therewith without due process of law. Section 5 of the Act of Congress of July 1, 1902, which is the organic law of the Philippine Islands, provides that, "No law shall be enacted in said Islands which shall deprive any person of life, liberty or property without due process of law, or deny to any person therein the equal protection of the laws." And by virtue of Section 1 of the same Act, hereinafter quoted, the instructions of President McKinley to the Philippine Commission, of April 7, 1900, are made a part of the organic law in these Islands. Among these instructions is to be found the following:—

> "In all the forms of government and administrative provisions which they are authorized to prescribe, the Commission should bear in mind that the government which they are establishing is designed not for our satisfaction or for the expression of our theoretical views, but for the happiness, peace, and prosperity of the people of the Philippine Islands, and the measures adopted should be made to conform to their customs, their habits, and even their prejudices, to the fullest extent consistent with the accomplishment of the indispensable requisites of just and effective government. At the same time the Commission should bear in mind, and the people of the Islands should be made plainly to understand, that there are certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of individual freedom, and of which they have, unfortunately, been denied the experience possessed by us; that there are also certain practical rules of government which we have found to be essential to the preservation of these great principles of liberty and law, and that these principles and these rules of government must be established and maintained in their islands for the sake of their liberty and happiness, however much they may conflict with the customs or laws of procedure with which they are familiar. It is evident that the most enlightened thought of the

Philippine Islands fully appreciates the importance of these principles and rules, and they will inevitably within a short time command universal assent. UPON EVERY DIVISION AND BRANCH OF THE GOVERNMENT OF THE PHILIPPINES, THEREFORE, MUST BE IMPOSED THESE INVIOLABLE RULES:

THAT NO PERSON SHALL BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY WITHOUT DUE PROCESS OF LAW * * * * *."

We have now seen that sovereignty in the Philippine Islands is vested in the people of the United States, who exercise the attributes of sovereignty in this territory through their agency, Congress. We have also seen that Congress, in legislating either directly or through such agency or medium as it may select for that purpose, is subject to those fundamental limitations in favor of personal rights which "go to the very root of its power to act at all, irrespective of time or place." We have also seen that Congress has expressly imposed these limitations on the powers conferred by it on the Government of the Philippine Islands.

Bearing in mind, then, that in whatever is done by any branch of the Government in the Philippine Islands, it is the sovereign will that these rules as to due process of law and the equal protection of the laws be observed, let us turn our attention to the question of the status of the Government of the Philippine Islands or, as it has been expressed with more accuracy, perhaps, of the government of the United States in the Philippine Islands.

The question of the status of the territorial governments, established by Congress in acquiring territories, presents some difficulty. There has been a tendency on the part of the courts within the territories thus organized to insist that the government so organized has the combined powers of the Federal and State governments within the States, subject only to such express limitations as Congress may have imposed in the organic law. In the case of United States

v. Bull, Vol. 8 Official Gazette, 273, 276, the Supreme Court of the Philippine Islands said:—

> "Within the limits of its authority the Government of the Philippines is a complete governmental organism with executive, legislative, and judicial departments exercising the functions commonly assigned to such departments. * * * * * * * * *."
>
> "In instituting this form of government the intention must have been to adopt the general constitutional doctrines which are inherent in the system. Hence, under it the Legislature must enact laws subject to the limitations of the organic laws, as Congress must act under the national Constitution, and the States under the national and state constitutions. The executive must execute such laws as are constitutionally enacted. The judiciary, as in all governments operating under written constitutions, must determine the validity of legislative enactments, as well as the legality of all private and official acts. In performing these functions it acts with the same independence as the Federal and State judiciaries in the United States. Under no other constitutional theory could there be that government of laws and not of men which is essential for the protection of rights under a free and orderly government.
>
> Such being the constitutional theory of the government of the Philippine Islands, it is apparent that the courts must consider the question of the validity of an act of the Philippine Commission or the Philippine Legislature, as a State court considers an act of the State legislature. The Federal Government exercises such powers only as are expressly or impliedly granted to it by the Constitution of the United States, while the States exercise all powers which have not been granted to the central government. The former operates under grants, the latter subject to restrictions. The validity of an Act of Congress depends upon whether the Constitution of the United States contains a grant of express or implied authority to enact it. An act

of a State legislature is valid unless the Federal or State constitution expressly or impliedly prohibits its enaction. An Act of the legislative authority of the Philippine Government which has not been expressly disapproved by Congress, *is valid unless its subject-matter has been covered by congressional legislation, or its enactment forbidden by some provision of the organic laws.*

The legislative power of the Government of the Philippines is granted in general terms subject to specific limitations. The general grant is not alone of power to legislate on certain subjects, but to exercise the legislative power subject to the restrictions stated. It is true that specific authority is conferred upon the Philippine Government relative to certain subjects of legislation, and that Congress has itself legislated upon certain other subjects. These, however, should be viewed simply as enactments on matters wherein Congress was fully informed and ready to act, and not as implying any restriction upon the local legislative authority in other matters. (See Opinion of Atty. Gen. of U. S., April 16, 1908.)"

In this case it was held that Act No. 55 of the Philippine Commission, penalizing certain acts and omissions incidental to the importation of live stock into the Philippine Islands was valid and within the powers of the Philippine Legislature, notwithstanding the fact that it was admitted that a similar statute enacted by the legislature of one of the States of the Union would have been legislation regulating foreign commerce and in violation of Article 1, Section 3 of the Constitution of the United States.

And in Severino v. the Governor-General, et al., 8 Official Gaz. 1171, 1175, the Supreme Court of the Philippine Islands said:

"The President of the United States, in the creation of civil government and the administration of civil affairs, exercised the combined powers of the Federal and State governments, and now Congress, in legis-

lating for this country, exercises the combined legislative powers which are exercised by the Federal and State Governments. The legislative power which was delegated by the President to the Philippine Commission and which was later ratified by the Congress of the United States was more comprehensive than the legislative powers now possessed by State governments."

On the other hand, the doctrine of the United States Supreme Court in dealing with the powers and limitations thereon of the governments organized in those territories subject to the jurisdiction of the United States and not included within any of the States is that they are mere dependencies of the Federal government, bearing much the same relation to the Central government that a county does to a state government. They possess none of the attributes of sovereignty in their own right, as representatives of and responsible to the people of the territory governed. On the contrary, they function as the mere local agencies or representatives of Congress, and under the direct and immediate supervision thereof, created thereby for the purposes of local convenience in dealing with the outlying domain of the United States. They must exercise such legislative, executive and judicial powers as Congress may have conferred upon them in accordance with the provisions of the law by which they are created and by which those powers are conferred. They do not operate subject to restrictions, but merely under grants. Crimes committed within their jurisdiction are committed, not against any local sovereign power, because there is none, but against the sovereignty of the United States, and therefore criminal process runs or should run in the name of the United States. In short, they are not sovereign states, but are mere local administrative divisions of the Central Government of the United States, in its capacity as the ruler in representation of the American people of all the territory of the United States not included within the states.

In Bank v. County of Yankton, 101 U. S. 129, 25 Law ed. 1046, the Supreme Court of the United States said:

"All territory within the jurisdiction of the United States not included in any State must, necessarily, be

governed by or under the authority of Congress. THE TERRITORIES ARE BUT POLITICAL SUBDIVISIONS OF THE OUTLYING DOMINION OF THE UNITED STATES. THEY BEAR MUCH THE SAME RELATION TO THE GENERAL GOVERNMENT THAT COUNTIES DO TO THE STATES, AND CONGRESS MAY LEGISLATE FOR THEM AS STATES DO FOR THEIR RESPECTIVE MUNICIPAL ORGANIZATIONS. The organic law of a Territory takes the place of a constitution, as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme and, for the purposes of this department of its governmental authority, has all the powers of the People of the United States, EXCEPT SUCH AS HAVE BEEN EXPRESSLY OR BY IMPLICATION RESERVED IN THE PROHIBITIONS OF THE CONSTITUTION.

In the organic Act of Dakota there was no express reservation of power in Congress to amend the Acts of the territorial Legislature, but none was necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial Legislatures, but it may itself legislate directly for the local government. It may make a void Act of the territorial Legislature valid, and a valid Act void. In other words, it has full and complete legislative authority over the People of the Territories and all the departments of the territorial governments. It may do for the Territories what the People, under the Constitution of the United States, may do for the States."

In Snow vs. United States, 85 U. S. (18 Wall.) 317, 21 Law Ed. 784, the following is said:

"The government of the territories of the United States belongs, primarily, to Congress; AND, SECONDARILY, TO SUCH AGENCIES AS CONGRESS MAY ESTABLISH FOR THAT PURPOSE. Dur-

ing the term of their pupilage as territories, they are mere dependencies of the United States. Their people do not constitute a sovereign power. All political authority exercised therein is derived from the general government.

It is, indeed, the practice of the government to invest these dependencies with a limited power of self-government as soon as they have sufficient population for the purpose. The extent of the power thus granted depends entirely upon the Organic act of Congress in each case, and is at all times subject to such alterations as Congress may see fit to adopt."

* * * * * * * * * *

"It must be confessed that this practice exhibits somewhat of an anomaly. Strictly speaking, there is no sovereignty in a territory of the United States but that of the United States itself. Crimes committed therein are committed against the government and dignity of the United States. It would seem that indictments and writs should regularly be in the name of the United States, and that the Attorney of the United States was the proper officer to prosecute all offenses." * * * * *"

In Territory vs. Daniels, 22 Pac. Rep. 159, 160, 6 Utah 188, 5 L. R. A. 444, the court said:

"The territories being mere dependencies of the United States, exercising delegated powers, and THEIR GOVERNMENTS BEING TEMPORARY AGENCIES employed by Congress to aid in their government during the term of their pupilage, the CAPACITY OF THEIR LEGISLATURES IS REGARDED MORE RIGOROUSLY BY THE COURTS, AND THEIR ENACTMENTS CONSTRUED LESS LIBERALLY THAN THE LAWS MADE BY A SOVEREIGN, and they will be held void with less hesitation when they are clearly unreasonable, oppressive, and unjust.

It is true that the government of the United States is also a government of delegated powers; but it is a

sovereignty; it is the embodiment of the power of the American people in its highest dignity and greatest force; its framers intended to confer upon it sufficient authority to protect rights and enforce duties, private or public, domestic or foreign, so far as might be necessary for the general government to do so. They designed it to stand amid all conditions and in every emergency, against everything human, reserving the right to change it according to the methods indicated in its constitution. When such a government expresses its intentions in laws, the courts will construe them liberally in order to give full effect to them. So with the states, for sovereignty is exercised partly through the national and partly through the state governments. It resides in the people, and they use it through the general government as an agency so far as deemed necessary for national purposes. The remainder they use through state governments so far as deemed necessary for state purposes. It follows that a law of congress, in harmony with the constitution of the United States, is superior to all others within its jurisdiction, and that a statute of a state, in harmony with the constitution of the United States and of the state, is superior to all others within its jurisdiction. Whether the law be of Congress or of a state it is the will of the sovereign, and therefore superior to every other. Such governments rank all others, and from the discretion of their law-makers there can be no appeal; there can be no tribunal of superior or equal authority found. ON THE CONTRARY, A TERRITORIAL GOVERNMENT IS AN AGENCY EMPLOYED BY CONGRESS TO AID IN GOVERNING THE PEOPLE OF THE TERRITORY IN THE SAME WAY AS A MUNICIPAL GOVERNMENT IS EMPLOYED BY THE LEGISLATURE OF A STATE TO AID IN THE GOVERNMENT OF THE POPULATION OF A CITY. * * * * * * *"

After quoting from Bank vs. Yankton, supra, as above, the court said:—

> "THE TERRITORIAL LEGISLATURE, BEING AN AGENCY EMPLOYED BY CONGRESS TO AID IN THE GOVERNMENT OF THE TERRITORY, AND TO THAT END AUTHORIZED TO EXERCISE THE POWERS DELEGATED BY THE ORGANIC ACT, CAN EXERCISE NO OTHERS. BECAUSE THE LIMIT BEYOND WHICH THE POWER DELEGATED TO ANY SUBJECT MAY NOT GO IS NOT EXPRESSLY DEFINED, IT DOES NOT FOLLOW THAT THERE IS NONE, AND THAT THE POWER IS ARBITRARY."
> * * * * * * * * * * * * * *"
>
> "In construing the provisions of the organic act in question, conferring power on the legislature, we are disposed to apply the rules of construction applicable to similar provisions in municipal charters."

In the American Insurance Co. vs. Bales of Cotton, 26 U. S. (1 Pet.) 511, Chief Justice Marshall held, that in legislating for territories, Congress exercises the combined powers of the general and state governments.

In Murrim vs. Converse, (Wyo., 1870) 2 Chic. Leg. N. 113, it was held that the power delegated to the territorial government must be exercised in strict conformity with the terms in which it is delegated.

See also Territory vs. Lee, 2 Mont. 124, 133, 134.

In De Lima vs. Bidwell, 182 U. S. 1, the United States Supreme Court, in discussing the status of the territory acquired by the United States by virtue of the Treaty of Paris, stated:—

> "In the more recent case of National Bank v. Yankton County, 101 U. S. 129, 25 L. ed. 1046, it was said by Mr. Chief Justice Waite that Congress 'has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people, under the Constitution of the

United States, may do for the states.' Indeed, it is scarcely too much to say that there has not been a session of Congress since the territory of Louisiana was purchased, that that body has not enacted legislation based upon the assumed authority to govern and control the territories. It is an authority which arises, not necessarily from the territorial clause of the Constitution, but from the necessities of the case, and from the inability of the states to act upon the subject. Under this power Congress may deal with territory acquired by treaty; may administer its government as it does that of the District of Columbia; it may organize a local territorial government; it may admit it as a state upon an equality with other states; it may sell its public lands to individual citizens, or may donate them as homesteads to actual settlers. In short, when once acquired by treaty, it belongs to the United States, and is subject to the disposition of Congress."

"It may undoubtedly become necessary, *for the adequate administration of domestic territory, to pass a special act providing the proper machinery and officers,* as the President would have no authority, except under the war power, to administer it himself; * * *"

The same conclusion is reached in Downes vs. Bidwell, 182 U. S. 244, where the court held that the Island of Porto Rico is a territory appurtenant and belonging to the United States.

These authorities demonstrate that the power of Congress over acquired territories is that of the combined Federal and State governments within a state, and that the local government usually provided for the territories bears a relation to the National government analogous to that borne by a county to a State government. Unless Congress, in organizing the local government for the Philippine Islands, has clearly expressed an intention to depart from this policy, we must come to the conclusion that our local government bears the same or a similar relation to the national government as that born by other territories heretofore organized. An examination of our

organic law indicates no such intention. On the contrary, our legislative powers are perhaps more restricted than those ordinarily possessed by territorial legislatures. Ordinarily, the legislative power granted a territorial legislature extends to "all rightful subjects of legislation" consistent with the Constitution and laws of the United States and the organic law of the territory. As we shall soon see, by our organic law, the only general clause in the grant of legislative power to the local government extended that power to all matters of a civil nature for which the Military Governor was formerly competent to provide by rules or orders of a legislative character. President McKinley's Instructions, infra. At any rate, there appears no intention to make any radical departure from the usual policy as to the nature of the powers delegated to the local government, except as required by local conditions. The organic law of the Philippine Government as contained in the Instructions of President McKinley of April 7, 1900, the Spooner Amendment of March 2, 1901, the Executive Order of June 21, 1901, made in pursuance of the Spooner amendment, and the Act of Congress of July 1, 1902, contain no language warranting the inference that the government created thereby was to be vested with unusual powers approximating those of an independent sovereignty. The language used in the Instructions is as follows:—

> "Beginning with the 1st day of September, 1900, the authority to exercise, subject to my approval, through the Secretary of War, *that part of the power of government* in the Philippine Islands which is *of a legislative nature* is to be transferred from the Military Governor of the Islands to this Commission, to be thereafter exercised by them in the place and stead of the Military Governor, *under such rules and regulations as you shall prescribe*, until the establishment of the civil central government for the Islands contemplated in the last foregoing paragraph, or until Congress shall otherwise provide. *Exercise of this legislative authority will include the making of rules and orders, having the effect of law, for the raising of revenue*

by taxes, customs duties, and imposts; the appropriation and expenditure of public funds of the Islands; the establishment of an educational system throughout the Islands; the establishment of a system to secure an efficient civil service; the organization and establishment of courts; the organization and establishment of municipal and departmental governments, and all other matters of a civil nature for which the Military Governor is now competent to provide by rules or orders of legislative character."

The Spooner Amendment provided that:—

"All military, civil, and judicial powers *necessary to govern the Philippine Islands* * * * * * shall until otherwise provided by Congress *be vested in such person* or *persons, and shall be exercised in such manner,* as the President of the United States shall direct, for the establishment of civil government, *and for maintaining and protecting the inhabitants of said Islands in the free enjoyment of their liberty, property, and religion.*"

This Amendment was enacted to set aside all doubt as to the legality of the President's proceedings under the order of April 7, 1900, and subsequently thereto and in pursuance thereof, the Executive Order of the 21st of June, 1901, was made as follows:—

"On and after the 4th day of July, 1901, until it shall be otherwise ordered, the President of the Philippine Commission will exercise the *executive authority in all civil affairs* in the government of the Philippine Islands heretofore exercised *in such affairs* by the Military Governor of the Philippines, and to that end the Hon. William H. Taft, President of the said Commission, is hereby appointed Civil Governor of the Philippine Islands. *Such executive authority will be exercised under, and in conformity to, the instructions to the Philippine Commissioners, dated April 7, 1900, and subject to the approval and control of the Secretary of War of the United States.* The municipal and provin-

cial civil governments, which have been, or shall hereafter be, established in said Islands, and all persons performing duties appertaining to the offices of civil government in said Islands will, in respect of such duties, report to the said Civil Governor.

The power to appoint civil officers, heretofore vested in the Philippine Commission, or in the Military Governor, will be exercised by the Civil Governor with the advice and consent of the Commission.

The Military Governor of the Philippines is hereby relieved from the performance, on and after the said 4th day of July, of the civil duties hereinbefore described, but his authority will continue to be exercised as heretofore, in those districts in which insurrection against the authority of the United States continues to exist, or in which public order is not sufficiently restored to enable provincial civil governments to be established under the instructions to the Commission dated April 7, 1900,"

As intimated in the Spooner Amendment, Congress took hold of the situation on July 1, 1902, and enacted what is known as the Philippine Bill. The Sections therein which bear on the question under discussion are as follows:—

SEC. 1. "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the action of the President of the United States in creating the Philippine Commission and authorizing said Commission to exercise the powers of government *to the extent and in the manner and form and subject to the regulation and control set forth in the instructions of the President to the Philippine Commission, dated April seventh, nineteen hundred*, and in creating the offices of Governor-General and Vice-Governor-General of the Philippine Islands, and authorizing said Governor-General and Vice-Governor-General *to exercise the powers of government to the extent and in the manner and form set forth in the executive order dated June twenty-first, nineteen hundred*

and one, and in establishing four executive Departments of government in said Islands as set forth in the Act of the Philippine Commission, entitled 'An Act providing an organization for the Departments of the Interior, of Commerce and Police, of Finance and Justice, and of Public Instruction,' enacted September sixth, nineteen hundred and one, is hereby approved, ratified, and confirmed, and until otherwise provided by law the said Islands shall continue to be governed as thereby and herein provided, and all laws passed hereafter by the Philippine Commission shall have an enacting clause as follows: 'By authority of the United States, be it enacted by the Philippine Commission'. The provisions of section eighteen hundred and ninety-one of the Revised Statutes of eighteen hundred and seventy-eight shall not apply to the Philippine Islands.''

Section 4 defines Philippine citizenship. Section 5 contains the bill of rights in force in the Philippines. Sections 6, 7 and 8 provide for the organization of the Philippine Legislature. Section 9 provides for the judiciary within the Islands. Section 10 provides for the appellate jurisdiction of the Supreme Court of the United States from certain decisions of the Supreme Court of the Philippine Islands. Sections 11 to 19, and 63 to 83 inclusive, specifically authorize the Government of the Philippine Islands to do certain things, such as to provide for the needs of commerce, to dispose of public lands, to purchase and hold real and personal property, and to issue bonds for the purchase price, to grant authority to municipalities to issue bonds for public improvements, to grant franchises, privileges and concessions, and to establish a mint and to coin money therein. By Section 86 it is provided that all laws passed by the Government of the Philippine Islands shall be reported to Congress, which thereby reserves the power and authority to annul the same, and the Philippine Commission is thereby directed to make an annual report of all its receipts and expenditures to the Secretary of War.

We must conclude from the system of supervision thus created that the local government possesses, in its own right,

none of the attributes of sovereignty, as we have already said. It is merely in its capacity as the local representative of the people of the United States, thru Congress, that it exercises the attributes of sovereignty. This representative character is manifested in many ways. For example, the legislative function of sovereignty is performed within the Philippine Islands "By authority of the United States," Section 1, Philippine Bill. All laws must be reported to Congress which reserves the power and authority to annul the same. Sec. 86, Philippine Bill. The executive function is exercised "under and in conformity to the instructions to the Philippine Commissioners, dated April 7th, 1900, and subject to the approval and control of the Secretary of War of the United States. See Executive Order, June 21, 1900. The Court of last resort in the Philippine Islands is the Supreme Court of the United States. Sec. 10, Philippine Bill. Thus the legislative, executive, and judicial functions of the local government are exercised under the immediate supervision and control of the home government. By General Orders. No. 58, Sec. 2, which forms our Code of Criminal Procedure, it is provided that all prosecutions for public offenses shall be in the name of the United States against the person charged with the offense. It is thus seen that crimes committed within the Philippine Islands are committed against the peace and dignity of the people of the United States, who are sovereign here. In the face of this, we do not believe that it was the intention of Congress to create a quasi sovereign state in the Philippine Islands.

It is probably exact to say that the power of Congress to legislate for the Philippine Islands is limited only by the fundamental restrictions in favor of life, liberty, and property, and that Congress in the exercise of this power has created a local administrative agency within the Philippine Islands, to whom it has delegated certain of the attributes of sovereignty, to be exercised in its capacity as the representative of Congress. This administrative unit, which, as the authorities say, corresponds to the county within the state, operates under grants of power, as does Congress itself, and not subject to restrictions, as do the states.

We have now seen that the ultimate depository of sovereignty over these Islands is in the people of the United States and that Congress, acting as the agent of the people of the United States, is empowered to make all needful rules and regulations for the government of these Islands, but that the exercise of this power is subject to the fundamental limitations as to due process of law in the protection of life, liberty and property. We have seen that Congress in the exercise of this power, has created a local government to which it has delegated certain of the attributes of sovereignty to be exercised by the local government in its representative capacity. We have also seen that Congress in the laws by which this local government has been organized, has taken care to express these limitations on its power to act, this perhaps, out of an abundance of precaution, in view of the fact that neither Congress nor its local agent could have transcended these limitations.

The power of Congress over the Philippines includes, of course, the power to exclude or expel aliens therefrom, subject as we have seen, to the organic provisions as to due process of law. Let us now inquire whether or not Congress has exercised this power, and, if so, how.

By the Act of Congress of April 29, 1902, all the laws then in force prohibiting and regulating the coming of Chinese persons and persons of Chinese descent into the United States were made applicable to the island territory under the jurisdiction of the United States.

By the Act of Congress of February 20, 1907, alien idiots, insane, paupers, deseased, incompetents, criminals, polygamists, etc., were excluded from admission into the United States, and by Section 33 thereof, the term "United States" was so defined as to include the Philippine Islands.

Section 4 of the former act provides for the registration of resident Chinese laborers, and the rights attaching thereto, and deportation for non-compliance therewith in the following terms:—

> "That it shall be the duty of every Chinese laborer, other than a citizen, rightfully in, and entitled to remain

in any of the insular territory of the United States (Hawaii excepted) at the time of the passage of this Act, to obtain within one year thereafter a certificate of residence in the insular territory wherein he resides, WHICH CERTIFICATE SHALL ENTITLE HIM TO RESIDENCE, THEREIN, and upon failure to obtain such certificate as herein provided he shall be deported from such insular territory; and the Philippine Commission is authorized and required to make all regulations and provisions necessary for the enforcement of this section in the Philippine Islands, including the form and substance of the certificate of residence so that the same shall clearly and sufficiently identify the holder thereof and enable officials to prevent fraud in the transfer of the same: Provided, however, That if said Philippine Commission shall find that it is impossible to complete the registration herein provided for within one year from the passage of this Act, said Commission is hereby authorized and empowered to extend the time for such registration for a further period not exceeding one year."

It thus seems to be the will of Congress that a duly registered Chinese laborer shall be entitled to residence within the Philippine Islands and shall not be subject to deportation therefrom.

Section 21 of the latter act provides the procedure to be followed in the deportation of any alien subject therefrom in the following terms:

> "That in case the Secretary of Commerce and Labor shall be satisfied than an alien has been found in the United States in violation of this Act, *or that an alien is subject to deportation under the provisions of this Act, or of any law of the United States,* he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came,

as provided by section twenty of this Act, and a failure or refusal on the part of the masters, agents, owners, or consignees of vessels to comply with the order of the Secretary of Commerce and Labor to take on board, guard safely, and return to the country whence he came any alien ordered to be deported under the provisions of this Act shall be punished by the imposition of the penalties prescribed in section nineteen of this Act: Provided, That when in the opinion of the Secretary of Commerce and Labor the mental or physical condition of such alien is such as to require personal care and attendance, he may employ a suitable person for that purpose, who shall accompany such alien to his or her final destination, and the expense incident to such service shall be defrayed in like manner."

It must be remembered that the term "United States" as here used includes the Philippine Islands. It would seem to be the will of Congress that no aliens, except Chinese, (see Section 43) should be subject to deportation, except within a period of three years after landing.

It will thus be seen that Congress has done considerable direct legislation in the exercise of this sovereign power. Has Congress delegated the general power to deport aliens to the legislative department of the Philippine Government?

So far as we have been able to find, the only express grant of any power in these matters is to be found in Section 4 of the Act of April 29, 1902, quoted above, as follows:—

"* * * * and the Philippine Commission is authorized and required to make all regulations and provisions necessary for the enforcement of this section in the Philippine Islands, including the form and substance of the certificate of residence so that the same shall clearly and sufficiently identify the holder thereof and enable officials to prevent fraud in the transfer of the same; Provided, however, That if said

> Philippine Commission shall find that it is impossible to complete the registration herein provided for within one year from the passage of this Act, said Commission is hereby authorized and empowered to extend the time for such registration for a further period not exceeding one year."

It will be noted that the metes and bounds of the authority of the Commission in these matters are very specifically outlined and demarked, utterly belying the intention of Congress to confer general power in these matters on the Commission. The Philippine Commission, then the legislative branch of the Philippine Government, exhausted the power conferred upon it by Congress in this Act, in promulgating Act No. 702 of the Philippine Commission providing for the registry of Chinese laborers resident in the Islands under penalty of deportation, and providing the rules for carrying out the deportation in such cases.

The implied existence of general power in these deportation cases must be denied, unless this power can be regarded as conferred upon the legislative branch of the Philippine Government by the general language of the President's Instructions of April 7, 1900, wherein the delegated legislative authority is made to include "all other matters of a civil nature for which the Military Governor is now competent to provide by rules or orders of a legislative character." There is every reason for rejecting the proposition that this power was included in the above general language. In the first place, the power to expel aliens is a power profoundly affecting international relations. Such a power is not lightly to be inferred from any general language. It is almost inconceivable that a responsible government would delegate such a power to an outlying territory, far away from its diplomatic center. Then the fact that in the only cases where Congress has expressly delegated any power in these matters to the Philippine Commission, the measure

and extent of the power conferred have been clearly and specifically demarked, indicates that the legislative branch of our local government has no general power in the matter. The maxim *expressio unius est exclusio alterius* must be applied. The attitude of Congress toward the whole matter, the structure and functions of the local government, and the inherent nature of the power itself, all indicate that it has never been delegated to the legislative branch of the Philippine Government.

The result is that the notorious Borja Act set forth in our statement of facts was inoperative as transcending the delegated powers of the legislative branch of our local government and for this reason, even if open to no other objection, may be ignored in the discussion of this case.

Neither has Congress either expressly or impliedly conferred the general power claimed by the Governor General upon the executive branch of the Philippine Government. Indeed, Congress could not do so. We believe that an act of Congress empowering the executive of these Islands to deport any alien herefrom whom he shall see fit to deport, and leaving entirely in the hands of the executive the power to determine the occasion or necessity for the deportation, and the procedure to be followed in each particular case, and making such procedure as he may see fit to adopt, whatever it may be, due process of law, would be as gross a transcendence of the fundamental limitations on the power of Congress to act, even in territory of the United States, as can well be imagined.

The power of expulsion of foreigners is a political power and the occasion and necessity for its exercise must first be determined by the legislative branches of the government.

> "In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations in peace, as well as in war. It belongs to the political department, of the Government, AND MAY BE EXERCISED EITHER THRU TREATIES MADE BY THE PRESIDENT AND SENATE, OR THROUGH STATUTES ENACTED BY CONGRESS * * * * *"
>
> Ekiu vs. U. S., et al., 142 U. S. 651, 659.

"The power to exclude or expel aliens, being a power affecting international relations, is vested in the political departments of the Government, AND IS TO BE REGULATED BY TREATY OR BY ACT OF CONGRESS, AND TO BE EXECUTED BY THE EXECUTIVE AUTHORITY ACCORDING TO THE REGULATIONS SO ESTABLISHED, except so far as the judiciary has been authorized by treaty or by statute, or AS REQUIRED BY THE PARAMOUNT LAW OF THE CONSTITUTION TO INTERVENE."

Fong Yue Ting vs. U. S., 149 U. S. 697, 713.

"That the Government of the United States, THROUGH THE ACTION OF THE LEGISLATIVE DEPARTMENT, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power. * * * * * * The Government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers. If, therefore, the Government of the United States, THROUGH ITS LEGISLATIVE DEPARTMENT, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be staid because at the time there are no actual hostilities with the nation of which the foreigners are subjects."

Chae Chan Ping vs. U. S., 130 U. S., 603,606.

"In other countries the question usually discussed in this connection is whether the executive without legislative delegation of authority may expel aliens. In England the power of the Crown is denied; in Ger-

many the right of the executive is recognized; in France it is delegated by statute. NO SUCH POWER IS CLAIMED FOR THE FEDERAL EXECUTIVE IN THE UNITED STATES."

Freund—Police Power, Section 704.

As these authorities indicate the power to determine the occasion or necessity for the expulsion or deportation of aliens is essentially legislative. Such power cannot be delegated to an executive officer. There are many laws upon the statute books conferring upon an executive officer the power to ascertain the facts or state of things upon which the operation of the law depends, but no legislative body can confer upon an executive officer the power to legislate. To be concrete—Congress may not delegate to the Chief Executive of the Philippines the power to determine whether or not Chinese laborers shall be excluded and if so upon what occasions or conditions. Congress may, however, determine that Chinese laborers shall be excluded or expelled from the Philippine Islands under certain conditions, and may confer upon the executive the power to ascertain the existence of those conditions upon which the operation of the law depends.

See Field vs. Clark, 143 U. S. 649.

Consolidated Coal Co. vs. Illinois, 185 U. S. 210.

In Lockes App., 72 Pa. St. 491, the Court said:—

"The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend".

It is true that in 1798, Congress enacted a law empowering the President of the United States "to order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable ground to suspect are concerned in any treasonable or secret machinations against the Government thereof," to be deported, etc. The President, however, never undertook to exercise the powers conferred upon him under this act and thus its constitutionality was never judicially tested. It was by its own terms limited in

operation to a period of two years dating from its passage. It provoked a perfect storm of protest which finally resulted in the promulgation of the famous Kentucky and Virginia Resolutions. It has been generally regarded as unconstitutional altho it provided for a hearing. Van Holst, Constitutional History of United States, p. 142.

But in the case under discussion it has been contended that this power has been conferred upon the executive of these islands by the Congress of the United States in the general language contained in the Spooner Amendment and the Executive Order of June 21, 1901, promulgated in pursuance thereof in which the Chief Executive of these Islands acquired "the executive authority in all civil affairs * * * * * * * heretofore exercised by the Military Governor of the Philippines * * * * to be exercised under and in conformity to the instructions to the Philippine Commissioners, dated April 7, 1900," all of which was ratified and confirmed in the Philippine Bill. In other words, it is contended that by this general language Congress intended to confer upon the Chief Executive of these Islands the same power that it attempted to confer on the Chief Executive of the United States in the Alien Act of 1798. No such extraordinary intention is indicated by the language used. No such extraordinary power is expressed or even suggested in any part of the instructions of April 7, 1900, under which, and in conformity to which the authority is to be exercised. The Military Governor of the Philippines had no such authority *in civil affairs.* The instructions of April 7, 1900, were the measure of the executive authority of the Civil Governor.

We must conclude then that Congress has not and can not confer upon the Chief Executive of these Islands its power to act in the matter of the deportation of aliens.

But even granting that in some way, Congress has conferred this power upon the legislative department or even upon the executive department of our local government, we have seen that their power to act in the premises is and must be limited by the fundamental provisions as to due process of law. It remains

to be seen what the expression "due process of law" means, as applied to the exercise of the sovereign power for the expulsion of aliens. We must confine ourselves to this application of the expression, inasmuch as the general expression, chameleon like, changes colour and signification when applied to different classes of cases. As was said in Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616, "In judging what is due process of law, respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible, in the special case, it will be adjudged to be due process of law; but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law'." See also State v. Sponaugle, 45 W. Va., 415.

In order to determine what due process of law means, as applied to the exercise of the sovereign power of expulsion or deportation of aliens, cases may not be used in which the same question is discussed as applied to the exercise of the powers of taxation, eminent domain and kindred powers, which rest upon an entirely different footing. We must confine ourselves to what has been said regarding due process of law as applied to the exercise of this very power. And we believe that we find that law, laid down, with its exact measures and limitations, in the Japanese Immigrant case (189 U. S. 86) in the following concise language:—

> "But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. ONE OF THESE PRINCIPLES IS THAT NO PERSON SHALL BE DEPRIVED OF HIS LIBERTY WITHOUT OPPORTUNITY, AT SOME TIME, TO BE HEARD, BEFORE SUCH OFFICERS, IN RESPECT OF THE MATTERS UPON WHICH THAT LIBERTY DEPENDS,—not necessarily an opportunity upon a

> regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute ARBITRARILY TO CAUSE AN ALIEN WHO HAS ENTERED THE COUNTRY, AND HAS BECOME SUBJECT IN ALL RESPECTS TO ITS JURISDICTION, AND A PART OF ITS POPULATION, ALTHOUGH ALLEGED TO BE ILLEGALLY HERE, TO BE TAKEN INTO CUSTODY AND DEPORTED WITHOUT GIVING HIM ALL OPPORTUNITY TO BE HEARD UPON THE QUESTIONS INVOLVING HIS RIGHT TO BE AND REMAIN IN THE UNITED STATES. NO SUCH ARBITRARY POWER CAN EXIST WHERE THE PRINCIPLES INVOLVED IN DUE PROCESS OF LAW ARE RECOGNIZED."

This language has been incorporated into the following decisions:

> Rafferty v. Judge, 7 Phil. Rep. 164, 167;
> Re Moy Quong Shing, 125 Fed. 641, 642;
> Re Sing Tuck, 126 Fed. 386, 398;
> Hopkins v. Fachant, 130 Fed. 839, 842;
> Wahrhouse v. U. S., 159 Fed. 876, 880,

and the case in which it was used has been cited in so many other cases as to have become indelibly fixed as the law of the land.

It is thus seen that the sovereign will in the Philippine Islands requires that no person be deprived of his liberty without due process of law and that means, as applied to the expulsion or exclusion of aliens, an "opportunity at some time, to be heard, before such officers, in respect of the matters on which that liberty depends". This opportunity was not accorded these deportees. The will of the state is that aliens, before being deported, be given all opportunity to be heard upon the questions involving their right to be and remain in the United States. That is the sovereign will. How can an act of deportation carried out in violation of the sovereign will, in this respect, be regarded as an act of the sovereign? As was said in the Greenhow case, supra,

it is "not the deed of the state, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name."

And how reconcile the requirement of an opportunity to be heard respecting the matter upon which their deportation depends, as an essential ingredient of "due process of law" as applied to these cases, with the following language used by one of the justices of the Supreme Court of the Philippine Islands in overruling defendant's demurrer in the prohibition cases.

> "When the power is once created and no rules are adopted for its enforcement, the person or authority who has to exercise such power has the right to adopt such sane methods for the carrying of the power into operation as prudence, good judgment, and the exigencies of the case may demand, AND WHATEVER RULES AND REGULATIONS FOR THE CARRYING INTO OPERATION THIS INHERENT POWER OF GOVERNMENT MAY BE ADOPTED, WHETHER THEY ARE PRESCRIBED OR NOT, WILL CONSTITUTE DUE PROCESS OF LAW".

Suppose these rules deprive the persons deported of the opportunity to be heard respecting the matter on which the deportation depends, as happened in the case under discussion, do they still constitute due process of law? If they do, then we ask, *what* does the language in the Japanese Immigrant cases mean? The Governor-General of these Islands claims the power "to take into custody and to deport any alien without giving him any opportunity to be heard upon the questions involving his right to be and remain in the Philippine Islands." The Supreme Court of the United States says that "no such arbitrary power can exist where the principles involved in due process of law are recognized." Does the power claimed by the Governor-General exist, or are the principles involved in due process of law recognized in the Philippine Islands? If the power exists, as claimed by the Governor-General, in the Philippine Islands, then the Supreme Court of the United States holds that the

principles involved in due process of law are not recognized here. Yet our organic law, the very law under which the office of Governor-General was created, compels him to recognize and observe the principles involved in due process of law. The conclusion is inevitable and unanswerable. The power claimed does not exist.

Moreover, inasmuch as these limitations bind all the departments of the local government, the Borja Act is inoperative and must be ignored. In other words, our local legislature has attempted to ratify and confirm an act of our Chief Executive which operated to deprive certain persons of their liberty without due process of law. It is obvious that what our legislature could not authorize it could not ratify. And it is just as obvious that our legislature could not authorize the deportation of any aliens without a hearing. Then our legislature could not ratify the acts of the Chief Executive set forth in our statement of facts.

We have already seen that this same limitation attaches to the power of Congress to act in the premises, either for purposes of authorization or ratification. Therefore no comfort can be derived from the fact that Congress has remained silent in regard to the Borja Act. An express ratification of the act of Congress would not add one jot or tittle to its "rich invalidity." CONGRESS ITSELF IS POWERLESS TO AUTHORIZE OR RATIFY SUCH AN ACT AS THAT OF THE GOVERNOR-GENERAL SET FORTH IN OUR STATEMENT OF FACTS.

Thus far our objection to the acts of deportation complained of in this case in so far as due process of law is concerned extends only to the procedure adopted. We believe that the fallacy of the position taken by our Chief Executive in claiming this power is far more fundamental. The power claimed by him includes the power to determine, in each particular case, the occasion or necessity for the deportation. If he possesses such power then the right to be heard is a useless right. What defense could one present? What facts could one show exempting himself from the exercise of the power? Due process of law is the very antithesis of arbitrary action. Arbitrary action is not

inconsistent with full and complete hearing. So, we believe that, even if the deportees in these cases had been given notice and full opportunity to be heard on the charges against them, still there would have been a gross violation of the principles involved in due process of law. No legal defense could be presented, because the only law governing the case is the will of our Chief Executive, "officially exercised," whatever such an expression may mean. Such a situation would be the very apotheosis of a government "by men" and the very antithesis of a government "by law," because the will of one man is the law.

We believe the language used in the Supreme Court of the United States in the following cases most forcibly expresses this fundamental error in the position taken by our Chief Executive.

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude THAT THEY DO NOT MEAN TO LEAVE ROOM FOR THE PLAY AND ACTION OF PURELY PERSONAL AND ARBITRARY POWER. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. BUT THE FUNDAMENTAL RIGHTS TO LIFE, LIBERTY AND THE PURSUIT OF HAPPINESS, considered as individual possessions, are secured by those maxims of constitu-

tional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the common-wealth 'may be a government of laws and not of men'. FOR, THE VERY IDEA THAT ONE MAN MAY BE COMPELLED TO HOLD HIS LIFE, OR THE MEANS OF LIVING, OR ANY MATERIAL RIGHT ESSENTIAL TO THE ENJOYMENT OF LIFE, AT THE MERE WILL OF ANOTHER, SEEMS TO BE INTOLERABLE IN ANY COUNTRY WHERE FREEDOM PREVAILS, AS BEING THE ESSENCE OF SLAVERY ITSELF." Yick Wo v. Hopkins, 118 U. S. 356.

"But it is not to be supposed that these legislative powers are absolute and despotic, and that the Amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every Act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'The general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law, Acts of attainder, Bills of pains and penalties, Acts of confiscation, Acts reversing judgments and Acts directly transferring one man's estate to another, LEGISLATIVE JUDGMENTS AND DECREES, and other similar special, partial and arbitrary exertions of power under the forms of legislation. ARBITRARY POWER, ENFORCING ITS EDICTS TO THE INJURY OF THE PERSONS AND PROPERTY OF ITS SUBJECTS, IS NOT LAW,

WHETHER MANIFESTED AS THE DECREE OF A PERSONAL MONARCH OR OF AN IMPERSONAL MULTITUDE. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. THE ENFORCEMENT OF THESE LIMITATIONS BY JUDICIAL PROCESS IS THE DEVICE OF SELF-GOVERNING COMMUNITIES TO PROTECT THE RIGHTS OF INDIVIDUALS AND MINORITIES, AS WELL AGAINST THE POWER OF NUMBERS, AS AGAINST THE VIOLENCE OF PUBLIC AGENTS TRASCENDING THE LIMITS OF LAWFUL AUTHORITY, EVEN WHEN ACTING IN THE NAME AND WIELDING THE FORCE OF THE GOVERNMENT." Hurtado v. People of California, 110 U. S. 516, 535.

"As to the words from Magna Charta, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: THAT THEY WERE INTENDED TO SECURE THE INDIVIDUAL FROM THE ARBITRARY EXERCISE OF THE POWERS OF GOVERNMENT, UNRESTRAINED BY THE ESTABLISHED PRINCIPLES OF PRIVATE RIGHTS AND DISTRIBUTIVE JUSTICE." Bank v. Okely, 17 U. S. (4 Wheat.) 235.

"Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; and, in the administration of criminal justice, requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offenses." Ex Parte Kemmler, 136 U. S. 436, 448.

It is our intention, before proceeding to a discussion of the remedies available to the deportees in this case, to examine

some of the authorities relied upon to support the position of our Chief Executive, and to show their inapplicability, and furthermore, to discuss the situation from the standpoint of the Spanish law from which our Chief Executive has insisted he derives these extraordinary powers. And first as to the authorities relied upon:

We believe that the case of U. S. v. Robins, Fed Cas. No. 16175, and the speech of John Marshall in the House of Representatives in connection therewith, is a particularly unfortunate selection. In that case Robins, on the suggestion of the diplomatic representatives of Great Britain, had been committed as implicated in a mutiny on the British Frigate Hermione in 1791, in accordance with Article 27 of the Jay Treaty between Great Britain and the United States. This Article provided for the extradition on requisition of persons charged with murder or forgery committed within the jurisdiction of the requisitioning party. When Robins was detained Congress had provided no machinery for carrying out the provisions of the treaty. While the habeas corpus proceedings were pending, the President of the United States, thru the Secretary of State, sent a letter to Judge Bee, of the United States District Court before whom the proceedings were being held, conveying to the Judge "his advice and request that Thomas Nash (Robins) may be delivered up to the Consul or other agent of Great Britain who shall appear to receive him". Apparently the letter did not influence the Court's decision in the slightest; because he said, in refusing the writ and turning the prisoner over to the British authorities:—

> "When application was first made, I thought this a matter for the executive interference, because the act of congress respecting fugitives from justice, from one state to another, refers it altogether to the executive of the states; but as the law and the treaty are silent upon the subject, recurrence must be had to the general powers vested in the judiciary by law and the constitution, the 3d article of which declares the judicial power shall extend to treaties, by express words."

The case aroused a terrific storm of discussion, debate and correspondence, and the question of the propriety of the President's action in the premises was finally made the subject matter of an investigation in Congress under a proposed resolution by Mr. Livingston, which contained the following language:—

> "That the decision of those questions by the President of the United States, against the jurisdiction of the Courts of the United States, in a case where those courts have already assumed and exercised jurisdiction; and his advice and request to the Judge of the District Court, that the said prisoner thus charged should be delivered up, provided only that such evidence of his criminality should be produced as would justify his apprehension and commitment for trial, are a dangerous interference of the executive with judicial decisions; and that the compliance with such advice and request on the part of the judge of the District Court of South Carolina, is a sacrifice of the constitutional independence of the judicial power, and exposes the administration thereof to suspicion and reproach."

The speech made by John Marshall, then a member of the House of Representatives, in opposition to this resolution is relied upon by the Governor General as establishing his position. In that speech Marshall summarized his position as follows:—

> "(1) That the case of Thomas Nash (Robins) as stated to the President was completely within the 27th Art. of the Treaty between the United States of America and Great Britain; (2) that this question was proper for executive, and not for judicial decision, and (3) that in deciding it the president is not chargeable with an interference of judicial decision."

In establishing his second point Marshall insisted that the provisions of the Treaty had the force of law, and said:—

> "The case was in its nature a national demand made upon the nation. The parties were the two

nations. They can not come into court to litigate their claims, nor can a court decide on them. Of consequence the demand is not a case for judicial cognizance. The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him. He possesses the whole executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation has to be performed through him. He is charged to execute the laws. A Treaty is declared to be a law. He must then execute a treaty where he, and he alone, possesses the means of executing it. The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object, is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till this be done it seems the duty of the executive department to execute the contract by any means it possesses. The gentleman from Pennsylvania contended that, although this should be properly an executive duty, yet it cannot be performed until Congress shall determine the mode of performance. He says that, although the jurisdiction of the courts is extended by the constitution to all cases of admiralty and maritime jurisdiction, yet if the courts had been created without an express assignment of jurisdiction, they could not have taken cognizance of cases expressly allotted to them by the constitution. The executive, he says, can, no

more than the courts, supply a legislative omission. It is not admitted that, in the case stated, courts could not have taken jurisdiction. The contrary is believed to be the correct opinion. AND ALTHOUGH THE EXECUTIVE CANNOT SUPPLY A TOTAL LEGISLATIVE OMISSION, yet it is not admitted or believed that there is such a total omission in this case."

Livingston's resolution was lost by a vote of 61 to 35. Mr. Bayard, who had also presented a resolution, which had been referred to the House as a Committee of the whole, to the effect that the President's action be approved, moved that the committee of the whole house be discharged from the further consideration of his proposed resolution and this motion was carried by a vote of 62 to 35. It will thus be seen that the House, acting as a committe of the whole, neither approved nor disapproved of the President's action. It will also be seen that Marshall in arguing the matter disagreed with Judge Bee's opinion that the case was not a matter for executive interference. As a matter of fact, this disagreement is clear from the language used by Mr. Marshal in a letter to the Virginia Federalist, which is published as a note to this celebrated case, as reported in Vol. 27 Fed. Cas., wherein he said:—

"Perhaps it will be said that the judge himself has denied the authority of the executive; and there is a passage in his speech that looks that way. But this is the opinion of the judge which seems liable to be questioned; and I strongly suspect it is not truly stated in the public prints."

Under no circumstances can this case be used as an authority for the position taken by the Governor General in the case under consideration, for the following reasons:—

1.—Judge Bee in denying the writ and turning the prisoner over to the British authorities acted independently of and at the same time denied the right of executive interference. He merely carried into effect and administered in a case properly

before him the 27th Article of the treaty which was the law of the land. It was the expression of the will of the sovereignty. In the case under consideration the sovereign people of the United States, acting through their agent the Government of the Philippine Islands, have never expressed their sovereign will in the manner indicated. In the Robin's case we have the execution of an exercised power of sovereignty. In the present case we have an assumption or usurpation of the power of sovereignty which the sovereign as yet has not seen fit to exercise. The executive agent of the sovereignty has seen fit to undertake the exercise of the power without the sovereignty having expressed its desire in the premises. In other words, the executive agent of the sovereignty has acted without the authority of his principal. HOW CAN HE COMFORT HIMSELF BY THE FACT THAT HIS PRINCIPAL HAS THE POWER WHEN HIS PRINCIPAL HAS NOT EXERCISED THAT POWER?

2. Neither can the Governor General derive any comfort from the argument of John Marshall in the House of Representatives, forcible as it was. His argument was to the effect that when the sovereign people of the United States had entered into a contract with an independent sovereignty, that that contract within the United States had the force of law, that it was the duty of the executive to enforce it, and that the mere fact that Congress had not provided the machinery or prescribed for its fulfillment would not relieve the President from the duty of enforcing it. We imagine that Marshal would have been the first to reject the proposition that because the sovereign people of the United States had the power to enter into such an agreement as that contained in the 27th Article of the treaty that the President of the United States could have delivered Nash (Robins) to the British authorities upon their requisition without that power ever having been exercised, or, in other words, without the treaty ever having been entered into. That is practically the position of the Governor-General in this case. He says that because the sovereignty has the inherent right or power of expelling aliens that he has the right

to exercise that power. There is all the difference in the world between executing the provisions of a treaty entered into in the exercise of the treaty-making powers and the execution of an act that might have been authorized in the exercise of the treaty-making powers, but which has never been so authorized. We believe that John Marshal would never have countenanced for one moment the interference of President Madison in the way he did if article 27 of the treaty had never been entered into. In fact, in the course of his argument he expressly said:

> "AND ALTHOUGH THE EXECUTIVE CANNOT SUPPLY A TOTAL LEGISLATIVE ADMISSION, YET IT IS NOT ADMITTED OR BELIEVED THAT THERE IS SUCH A TOTAL ADMISSION IN THIS CASE."

Until the power has been exercised by the sovereignty through its government, in accordance with organic law by which the sovereignty has created that government, that power cannot be exercised by the executive department of the government.

Moyer v. Peabody, 212 U. S. 78, is also relied upon in support of the position taken by the Governor-General.

That was a case in which an action had been brought against the former governor of the State of Colorado and certain officers of the National Guard of the same State for an imprisonment of the plaintiff by them while in office. The defendant ex-governor, acting under powers conferred upon him by the State constitution, had declared a county to be in a state of insurrection, had called out troops to put down the trouble, and had ordered that the plaintiff should be arrested as a leader of the outbreak, and should be detained until he could be discharged with safety. His declaration of the state of insurrection was held to be conclusive of that fact, under the powers conferred upon him by the State constitution, and rightly so, we believe, in the absence of an allegation that his declaration was arbitrary, unfounded, and in abuse of the authority. We believe that the principal runs all through the law, that where-

ever an executive officer is vested with a discretionary or quasi-judicial power, his findings in the exercise of that power are conclusive unless he has been guilty of an abuse or an arbitrary use thereof. There was no contention in the Moyer case that the chief executive of the State of Colorado had acted arbitrarily in proclaiming a state of insurrection. The fact that he so found created at once, and by virtue thereof, a condition of martial law, a condition of no law, a condition which the law recognizes as an effort on the part of the State to restore its authority, to restore the law. Due to the existence of this condition, this suspension of the authority of the law, the organic provisions thereof relating to the protection of persons and property were for the time being, and as incident thereto, suspended. It was during this time, and under these conditions that the plaintiff, Moyer, President of the Western Federation of Miners, was apprehended and detained for a period of four or five months.

In the cases under consideration, as we have already seen, the sovereign state in the Philippines has never conferred the powers claimed upon our Chief Executive, either expressly or impliedly. In the Moyer case, the defendant acted under and by virtue of a power conferred upon him by the state. Furthermore, there is and can be no serious pretense that the presence of the twelve deportees within the Philippines produced such disturbance as to suspend the authority of the law, as to produce, as we have said, a condition of martial law, of no law, such as to make it necessary for our government authorities to disregard the law in order to restore the authority thereof.

On the question of due process of law the case of Murray v. Hopkins Land & Improvement Co., 18 Howard, 272, is relied upon.

That was a case in which the question before the court was whether or not the execution of a warrant of distress against the goods of a delinquent tax collector issued by the Solicitor of the Treasury under an Act of Congress without giving the delinquent collector a hearing other than that provided by the auditing of his books, was due process of law.

The court applied the historical test to the expression "due process of law" and found that no other hearing was required in order to comply with the constitutional provision as to due process of law.

In this case the principle which we have already pointed out, viz., that the meaning of the expression "due process of law" varies with the subject matter and the incidents of the situation is clearly laid down. It is clear that the process used by the state in the collection and care of its revenue, could not be used in the exercise of powers involving the liberty of persons.

The well known case of U.S. v. Ju Toy is also relied on. That case merely stands for the proposition that Congress, under the powers conferred upon it by the constitution, may prescribe the conditions and regulations under which aliens shall be admitted into the United States, and may commit the enforcement of these conditions and regulations exclusively to executive officers, without judicial intervention in the absence of an abuse of the authority, that the jurisdiction of such executive officer may extend to persons applying for admission on the ground that they are native born citizens, and the decision of the executive officers in such cases may be made final and is due process of law, in the absence of an abuse of authority. This case warrants the exercise, without right of review, by an executive officer, of an authority expressly granted to him by the legislature. It can in no way be construed to support the exercise by an executive officer of an authority not granted to him, as is here attempted.

The case of U. S. v. Heinzsen & Co., 206 U. S. 370, in connection with the Borja legislation, set forth in our statement of facts, is relied upon in support of the position taken by our Chief Executive.

That was a case in which it was held that Congress might lawfully ratify the exaction of tariff duties collected without authority, and that such ratification would deprive the persons against whom the tariffs had been exacted of any action which they might otherwise have had. The Supreme Court of the United States was very emphatic to the

effect that Congress could only exercise such power of ratification *as to matters within its authority.*

> "That where an agent, without precedent authority, has exercised, in the name of a principal, A POWER WHICH THE PRINCIPAL HAD THE CAPACITY TO BESTOW, the principal may ratify and affirm the unauthorized act, and thus retroactively give it validity when rights of third persons have not intervened, is so elementary as to need but statement. That the power of ratification AS TO MATTERS WITHIN THEIR AUTHORITY may be exercised by Congress, state governments, or municipal corporations, is also elementary." P 382.
>
> "Indeed, the contention goes further even than this, since it entirely disregards the important consideration that, although the duties were illegally exacted, THE ILLEGALITY WAS NOT THE RESULT OF AN INHERENT WANT OF POWER in the United States to have authorized the imposition of the duties, but simply arose from the failure to delegate to the official the authority essential to give immediate validity to his conduct in enforcing the payment of the duties." P. 385.
>
> "But here, again, the argument disregards the fact that when the duties were illegally exacted in the name of the United States CONGRESS POSSESSED THE POWER TO HAVE AUTHORIZED THEIR IMPOSITION IN THE MODE IN WHICH THEY WERE ENFORCED, and hence, from the very moment of collection, a right in Congress to ratify the transaction, if it saw fit to do so, was engendered." P. 386.

We have already seen that there is an inherent want of power in our Philippine legislature to enact such legislation as that contained in the Boija act.

The case of O'Reilly de Camara v. Brooke, Major General, as reported 142 Fed. Rep. 859, is relied upon. In that case the District Court held that the ratification by the executive, Congress, and the treaty making power, of an act of the defendant while military governor of Havana, whereby he revoked the slaughter house franchise held by

the plaintiff as a hereditary right incident to the office of sheriff, made the act of revocation the act of the United States, and released the defendant from liability. Bnt that case was appealed to the Supreme Court of the United States and is reported in 209 U. S. 54. The Supreme Court affirmed the decision but on an entirely different ground, viz., that the right to the incidents of the office of sheriff terminated with the termination of Spanish sovereignty in the Island of Cuba, under and by virtue of which the office had been held. The question of the effect of Congressional ratification was hardly noticed and not decided.

In any case the application of these authorities to the case under discussion rests upon the following premises. (1) That the Philippine legislature has the general power to enact legislation providing for the deportation of aliens. We have already seen that this is not true. (2) That, even if our legislature were vested with such power, it could not have authorized the deportations in this case in the manner in which they were carried out. We do not believe our legislature could have authorized the deportation of these men without a hearing. (See Japanese Immigrant Case, supra.) It follows, of course, that it cannot ratify such a deportation.

This very question was up in the case of Johnson v. Jones, 44 Ill. 142, in which it was held that an Act of Congress ratifying an order of President Lincoln made during the Civil War, in virtue of which the defendants had imprisoned the plaintiff without due process of law, did not deprive the plaintiff of his action in tort against the defendants.

The same question was made in Mulligan v. Hovey, Fed. Cas. 9605, on similar facts and the same doctrine laid down.

See also Jones v. Seward, 40 Barb. 563.

The reasoning would seem to be clear. Our organic law prohibits interference with liberty of all persons, including foreigners, without due process of law. Due process of law as applied to the deportation of aliens, means, as we have seen, a full opportunity to be heard, before competent officers, on the facts upon which the question of deportation

depends. A legislative act authorizing such deportation without such hearing would be a plain violation of the organic law, of the sovereign will. A legislative ratification of such a deportation is equally so. It is no law. Neither does that part of the Borja law which purports to prohibit judicial intervention in the case affect the situation. The Philippine legislature cannot enact legislation transcending its organic limitations, and then deprive the courts of jurisdiction to determine whether or not the organic limitations on its power have been transcended.

Let us now consider the status of the Spanish law invoked by our Chief Executive in support of the position taken by him in these cases.

The royal order of August 2, 1888, embodies the Spanish law in the Philippine Islands prior to the American occupation and purports to place the entire power in the hands of the Governor General. It is as follows:—

"Ministerio de Ultramar No. 607.

Sir:—In view of the record prepared for the purpose of a consultation by the Audiencia de Manila to the Government through the Supreme Court and the brief prepared concerning the subject of the consultation, namely, deportation, which was referred to the political department of this Ministerio, and there a brief prepared: His Majesty, the King, and in his name the Queen Regent have seen fit to resolve:

1. That according to the laws 18, 19 and 20, Title 8, Book 7—35, Title 15, Book 2—7, Title 4, Book 3—61, Title 3, Book 3, and the royal cedula of the 19th of May, 1819, and the reserved royal decree of the 20th of April, 1881, the Governors General of the Philippines have authority to determine the legal convenience of deportation which they consider necessary for the preservation of public order.

2. That the record prepared by the Governor General (in these cases), shall be referred to the Supreme Government of the Nation in the form and

manner provided by the laws of the Indies, in order that information be furnished of the reasons for having ordered the deportation.

3. That the class and form of justification that ought to appear in the records shall be left to the prudent judgment of the Governors-General.

4. The said Governors-General may deport persons, even though they should have been accused of crimes in the courts of justice and they should have been pardoned as provided in Law 20, title 8, of Book 7, of the Recopilación de Indias.

5. That in relation to persons subjected to the action of the courts of justice who should have been acquitted, if the charges forming the object of the deportation should have been the subject matter considered in the trial of these cases, bearing in mind the sanctity of *res judicata*, the Governors-General must not order the deportation.

6. That these deportations shall be ordered by the Governor-General himself, and not by his Lieutenants and Assistants according to law 19, Title 8, Book 7 of the Recopilacion de Indias.

7. That the laws in force in the Philippines concerning deportations are those of the Indies already named; *so that the failure to comply rigorously and exactly with the requirements of those laws for the exercise of that power, constitutes the crime defined in articles 211, and 212 of the Penal Code now in force in the Philippines.*

8. That the right of appeal conceded by the Royal Order of the 25th of May, 1847, to the Audiencia, from the Acts of the Governor General, has been abrogated by the Decree of the 9th of June, 1878, put in force in the Philippines by another of the 28th of November of the same year, establishing in its 7th article that the acts of the Governor-General dictated in matters

of government or in the exercise of his discretionary faculties, can only be revoked by the Supreme Government."

This decree was never published in the Philippines, and, therefore, if it adds anything to the authority of Governor-General prior thereto, as to such additional authority, it was never in force. The laws mentioned in the first paragraph thereof, as constituting the law relative to deportation in the Philippines, are as follows:—

Laws 18, 19 and 20, Title 8, Book 7.

18. "If there should be any gentlemen, or other persons, whom it is expedient to banish from the Indies and present to us, the Governor may do so. And we should be sent by another voyage a copy of the record, closed and sealed, in order that we may be informed, and such action will not be taken without very great reason therefor.

19. "Let there be put a clause in the commissions of the Governors by which they shall be empowered if it seems expedient to them, to banish from the land any agitators, nevertheless with an appeal, and because their lieutenants and officers pretend to do this, and the power ought not to be extended to other inferior officers, we command that no others than our governors execute it, in their own proper persons.

20. The viceroys, presidents, and governors shall observe that which is prescribed in law 61, title 3, book 3, and may expel from their provinces those whom it is expedient to the service of God, Nuestro Señor and ours, and to the peace and public order that they should not reside in the said Kingdom, notwithstanding that they may have obtained pardon for their crime, referring to us the case in order that we may examine as to whether it is justified or not."

61. Title 3, Book 3, is as follows:—

"If it appears expedient to the viceroys for the service of God, Nuestro Señor, and ours to banish from those Kingdoms and to send to these any per-

sons, they may be made to leave after having proceeded judicially, and the completed record shall be referred to us in order that we may see that there was sufficient reason for this resolution."

7 Title 4, Book 3:—

"If it should happen that some persons disturb the country, we command that the viceroys, presidents and governors, according to the method that seems to them most fit and convenient, shall proceed to take these men from that province, together with their children, brothers and relatives and the others who may have followed their faction and to locate them in safe places where they shall be near in order that they may not cause comment."

Law 35, Title 15, Book 2, merely provides for an appeal to the audiencia from orders or decrees of the viceroys or presidentes.

This law, if ever in force in the Philippines, must be regarded as derogated by the change of sovereignty and by the organic provisions as to due process of law contained in the Instructions of President McKinley and the Philippine Bill. The Spanish authorities themselves are to this effect.

Article 6 of the Spanish Constitution of 1869, provides:—

"No Spaniard can be compelled to change his domicile or residence, except by virtue of sentencia ejecutoria."

This constitution was promulgated in Spain on the 10th of June, 1870. On the 4th of July, of the same year, the law of foreigners was promulgated, and in article 29 thereof, it was provided that:—

"The foreigners, who, in accordance with this law, reside in the Spanish provinces beyond the sea shall have the right to the security of their persons, property, domicile and correspondence in the form established by the laws for Spaniards."

The result is that, in Spain, at lest, by virtue of the law of foreigners in relation with article 6 of the Constitution

of 1869, a foreigner cannot be compelled to change his domicile or residence except by virtue of a judgment of a competent court. The same provision was repeated and substantially the same language used in the Constitution of 1876, Article 9 of which is as follows:—

> "No Spaniard can be compelled to change his domicile or residence, except by virtue of an order of a competent authority, and in the cases provided by law."

It is true that these constitutions were never extended to the Philippines, but the law of foreigners was so extended on the 20th of October, 1870. We beg to call attention to the order of the supreme government of that date, which order can be found in Volume 4, Berriz Diccionario de la Administracion de Filipinas, page 423, and which in effect abrogates the laws of the Indies regarding foreigners.

The effect of the above quoted article 9 of the Constitution of 1876 upon the deportations effected by government intervention in Cuba, was considered and passed upon in the Royal Decree of the 2nd of January, 1886. This Decree is to be found in Alcubilla, Diccionario de la Administracion Española, Volume 4, page 46, in which it is said that "deportation as a Government measure is incompatible with Article 9 of the Constitution. Therefore, and as a consequence of the said Constitution having been promulgated in Cuba, the following was ordered." Then follows an order authorizing those persons who had been deported from Cuba as a Government measure to return to the Island. It thus follows that the Spanish authorities regarded the following language: "No Spaniard can be compelled to change his domicile or residence except *by virtue of an order of a competent authority, and in cases provided by law*" in Article 9 of the Constitution of 1876 as completely abrogating any special power to deport that might have been vested in the executive authority prior to that time and as effecting the abrogation of orders of deportation made prior to the promulgation of said Constitution in Cuba. It is absolutely impossible to distinguish in meaning and spirit between Article 9 of the Constitution of 1876, so far as it relates to the question under discus-

sion in this case, and the emphatic language contained in President McKinley's Instructions to the Philippine Commission of April 7, 1900, which we again quote:

> "Upon every division and branch of the Government of the Philippines, therefore, must be imposed these inviolable rules."
>
> "That no person shall be deprived of life, liberty, or property without due process of law."

If any such extraordinary power was vested in the Governor-General prior to the American occupation of these Islands as is contended by our Chief Executive that power would have been cut off if Article 9 of the Constitution of 1876 had been promulgated in these Islands. That proposition is clear from the Royal Decree of the 2nd of January, 1886, referred to above. But, by virtue of the executive order of June, 21, 1901, the executive power of these Islands is vested in the Civil Governor, who became subsequently the Governor-General to be exercised under and in conformity to the instructions of the Philippine Commisison, dated April 7, 1900, and subject to the control of the Secretary of War of the United States. The promulgation of those instructions in the Philippine Islands was equivalent to the promulgation here of Article 9 of the Constitution of 1876 so for as this question is concerned and, in accordance with the doctrine of the decree of January 2nd, 1886, heretofore mentioned, must have cut off any such extraordinary power as to these deportations as the Governor-General may have had before then, granting that that extraordinary power existed. The only authority which the Governor-General of these Islands has is derived from the President's Instructions of April 7, 1900, and the executive order of June 21, 1901, as confirmed and ratified by the Philippine Bill of July 1, 1902. In those instructions and in that order there is no authority for him to proceed as the Spanish Governors General proceeded. On the contrary, he is directed and expressly commissioned to exercise his executive authority under and in conformity to said instructions. That executive order, the Philippine Bill and all subsequent legislation can be searched word by word, and

no such authority can be found as is claimed by the Governor-General in this case; namely, the authority, without judicial action and according to his own free will, to deport aliens from these Islands.

Furthermore, such powers as possessed in these cases by the Spanish Governors-General in their capacity as the representative of the Spanish crown in the Philippines must be regarded as political in their nature and as such appertaining to the prerogatives of the former sovereignty. Such powers immediately cease upon change of sovereignty.

Railway Co. v. McGlinn, 114 U. S. 542, 546;
Munford v. Wardwell, 6 Wall, 423, 435.
More v. Steinbach, 127 U. S. 70, 81;
Insurance Co. v. Canter, 26 U. S. (1 Pet.) 511;
Pollard's Lessee v. Hagan, 3 How (U. S.) 212;
Attorney General's Letter to Secretary of War, July 10, 1899.

In Pollard's Lessee v. Hagan, supra, the Court said:—

> "It cannot be admitted that the King of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; AND MUCH LESS CAN IT BE ADMITTED THAT THEY HAVE CAPACITY TO RECEIVE OR POWER TO EXERCISE THEM."

In Munford v. Wardwell, supra, the proposition that our military governor exercised the same power as the Spanish Governor-General in civil affairs is clearly refuted by the following language:

> "Mexican rule came to an end in that department on the 7th of July, 1846, when the government of the same passed into the control of our military authorities. Municipal authority also was exercised for a time by subordinate officers appointed by our military commanders. Such commander was called military governor, and *for a time he claimed to exercise the same civil power as that previously vested in the Mexican governor of the deparment.* By virtue of that supposed authority Gen. S. N. Kearney, March 10, 1847, as military governor

of the territory, granted to the town of San Francisco all the right, title, and interest of the United States to the beach and water lots on the east front of the town, included between certain described points, excepting such lots as might be selected for government use * * * *"

"But the power to grant lands or confirm titles was never vested in our military governors; and it follows as a necessary consequence that the grant, as originally made, was void and of no effect. Nothing passed to the town by the grant, and, of course, the doings of the alcalde in selling the lot in question was a mere nullity." Magoon—The Law of Civil Government under Military Occupation. Pp. 29, 188, 359, 390.

We must conclude then that such powers as the Spanish Governors-General held in these matters of deportation were not only derogated by the promulgation in the Philippine Islands of the organic provisions as to due process of law, as the Spanish authorities themselves hold, but that they ceased with the transfer of sovereignty and that our military governor had "no capacity to receive or power to exercise them."

In conclusion, then, we may summarize the municipal law of the Philippine Islands relating to the deportation of aliens as follows:

(1) The people of the United States are the sovereign of the Philippine Islands.

(2) Their agent for the government of the Philippine Islands is the Congress of the United States.

(3) Under the powers conferred upon Congress for the government of the Philippine Islands, Congress may not, either directly or through its local legislative medium, so legislate as to deprive the inhabitants of these Islands of their life, liberty, or property without due process of law.

(4) Congress has expressly prohibited all the branches of the Government of the Philippine Islands from so acting as to deprive any inhabitant thereof of his life, liberty or property without due process of law.

(5) The Government of the Philippine Islands is a legislative government, the local agency created by Congress as

a convenient medium for exercising the Congressional control in local matters, possessing only such powers as are granted in the organic laws of the Philippine Islands, and exercising those powers as the local representative of Congress.

(6) Congress, in the exercise of the inherent power of the state to expel aliens in its capacity as the representative of the sovereign American people, has voiced the will of the sovereign in the Philippine Islands as to the occasions on which the power shall be exercised and the procedure to be followed by its Acts of April 29, 1902, and February 20, 1907.

(7) Congress has never expressly or impliedly vested the Philippine Legislature with this power, except to the extent and in the manner provided in the Act of April 29, 1902.

(8) Congress can not delegate to the Chief Executive of these Islands this general power, because such power is essentially legislative in character and may not be delegated to the executive authority.

(9) In any case, the exercise of such power by any department of the Philippine Government must be subject to the organic provisions as to due process of law, which mean among other things a full opportunity to be heard before competent officers respecting the matters on which the deportation depends.

(10) When such opportunity is not given, neither our local legislature nor Congress itself can ratify the act.

(11) The expression "due process of law" as applied to the deportation of aliens, excludes the idea that the power may be exercised according to the arbitrary whim of one man.

(12 The Spanish law formerly in force in these Islands relating to deportations as an administrative measure has been abrogated by the change of sovereignty and the promulgation of the organic law of the Philippine Islands, as contained in President McKinley's Instructions, the Executive Order of June 21st, 1900, and the Philippine Bill.

HAVE THE COURTS OF THE PHILIPPINE ISLANDS JURISDICTION TO ENJOIN THE GOVERNOR-GENERAL

AND HIS SUBORDINATES FROM CARRYING OUT THE THREATENED ACTS SET FORTH IN OUR STATEMENT OF FACTS?

It will be remembered that in the actions begun in the Court of First Instance of the city of Manila the deportees prayed for damages for the deportation to which they had already been subjected, and for an injunction to prevent the threatened repetition thereof. The question presents itself whether our Chief Executive may be restrained by our Courts from a threatened invasion of private rights and individual liberty such as set forth in our statement of facts.

The question whether the governor of a state may be restrained by injunction or other judicial process while acting officially has been directly before the Supreme Court of the United States in a number of cases. The result of the decisions seems to be that the courts may restrain a state governor, while acting officially, but unlawfully, from the performance of affirmative acts resulting in the invasion of private rights, though they cannot compel the performance by the governor of official duties which the law imposes upon him, even though the non-performance thereof may result in individual wrong and injury unless, perhaps, they are of the simplest ministerial character. It is our purpose to trace the development of this doctrine in the United States Supreme Court.

In the great case of Marbury v. Madison, (1803) 1 Cranch. 174, it was held that the court could compel the Secretary of State of the United States to perform a ministerial act, such as the delivery of a commission signed by the President of the United States. In deciding the case, Marshal used language so persuasive and forcible, and so applicable to the question now before us that at the risk of being tedious we take the liberty of repeating it somewhat at length.

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. IN GREAT BRITAIN THE KING

HIMSELF IS SUED IN THE RESPECTFUL FORM OF A PETITION, AND HE NEVER FAILS TO COMPLY WITH THE JUDGMENT OF HIS COURT."

"THE GOVERNMENT OF THE UNITED STATES HAS BEEN EMPHATICALLY TERMED A GOVERNMENT OF LAWS, AND NOT OF MEN. IT WILL CERTAINLY CEASE TO DESERVE THIS HIGH APPELLATION, IF THE LAWS FURNISH NO REMEDY FOR THE VIOLATION OF A VESTED LEGAL RIGHT."

" * * WHAT IS THERE IN THE EXALTED STATION OF THE OFFICER, WHICH SHALL BAR A CITIZEN FROM ASSERTING, IN A COURT OF JUSTICE, HIS LEGAL RIGHTS, OR SHALL FORBID A COURT TO LISTEN TO THE CLAIM, OR TO ISSUE A MANDAMUS DIRECTING THE PERFORMANCE OF A DUTY, NOT DEPENDING ON EXECUTIVE DISCRETION, BUT ON PARTICULAR ACTS OF CONGRESS, AND THE GENERAL PRINCIPLES OF LAW?"

"IF ONE OF THE HEADS OF DEPARTMENTS COMMITS ANY ILLEGAL ACT, UNDER COLOUR OF HIS OFFICE, BY WHICH AN INDIVIDUAL SUSTAINS AN INJURY, IT CANNOT BE PRETENDED THAT HIS OFFICE ALONE EXEMPTS HIM FROM BEING SUED IN THE ORDINARY MODE OF PROCEEDING, AND BEING COMPELLED TO OBEY THE JUDGMENT OF THE LAW. HOW, THEN, CAN HIS OFFICE EXEMPT HIM FROM THIS PARTICULAR MODE OF DECIDING ON THE LEGALITY OF HIS CONDUCT, IF THE CASE BE SUCH A CASE AS WOULD, WERE ANY OTHER INDIVIDUAL THE PARTY COMPLAINED OF, AUTHORIZE THE PROCESS?"

"IT IS NOT BY THE OFFICE OF THE PERSON TO WHOM THE WRIT IS DIRECTED, BUT THE NATURE OF THE THING TO BE DONE, THAT

THE PROPRIETY OR IMPROPRIETY OF ISSUING A MANDAMUS IS TO BE DETERMINED."

In the great case of Osborn v. Bank (1824), 9 Wheat. 738, it was held that an injunction lay to restrain a state officer, the auditor, from enforcing the collection of a tax on the Bank of the United States, the tax having been levied under a state law. In holding this, Chief Justice Marshall used the following language.

> "A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the government is in the exercise of its best-established and most essential powers, as well as to those which may be deemed questionable. It asserts that the agents of a state, alleging the authority of a law void in itself, because repugnant to the constitution, may arrest the execution of any law in the United States. It maintains that, if a state shall impose a fine or penalty on any person employed in the execution of any law of the United States, it may levy that fine or penalty by a ministerial officer, without the sanction even of its own courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the government. The carrier of the mail, the collector of the revenue, the marshal of a district, the recruiting officer, may all be inhibited, under ruinous penalties from the performance of their respective duties; *the warrant of a ministerial officer may authorize the collection of these penalties, and the person thus obstructed in the performance of his duty, may indeed resort to his action for damages*, after the infliction of the injury, but cannot avail themselves of the preventive justice of the nation to protect him in the performance of his duties. Each member of the Union is capable, at its will, of attacking

the nation, of arresting its progress at every step, of acting vigorously and effectually in the execution of its designs, while the nation stands naked, stripped of its defensive armor, and incapable of shielding its agent or executing its laws, otherwise than by proceedings which are to take place after the mischief is perpetrated, and which must often be ineffectual, from the inability of the agents to make compensation."

In Davis v. Gray (1872) 16 Wall. 203, the bill was for an injunction to restrain the Governor and the Land Commissioner of the State of Texas from interfering with or the infringment of a land grant or reservation of a railroad company, of which the plaintiff was receiver, under an ordinance of the constitutional convention providing for grants of land to heads of families settling within the railroad reservation. In passing on the question of jurisdiction, the court said:—

"A few remarks will be sufficient to dispose of the jurisdictional objections as to the appellants.

In Osborne v. Bank, 9 Wheat. 738, three things, among others, were decided:—

(1) A circuit court of the United States, in a proper case in equity, may enjoin a state officer from executing a state law in conflict with the constitution or a statute of the United States, when such execution will violate the rights of the complainant.

(2) * * * * * * * * *

(3) In deciding who are parties to the suit the court will look beyond the record. Making a state officer a party does not make the state a party, although her law may have prompted his action, and the state may stand behind him as the real party in interest. A state can be made a party only by shaping the

bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case."

"According to the jurisprudence of Texas, suits like this can be maintained against the public officers who appropriately represent her touching the interests involved in the controversy. Ward v. Townsend, 2 Tex. 581; Glasscock v. Com. Land Office, 3 Tex. 51; Com. Land Office v. Smith, 5 Tex. 471; McLelland v. Shaw, 15 Tex. 319; Stewart v. Crosby, 15 Tex. 547. IN THE APPLICATION OF THIS PRINCIPLE THERE IS NO DIFFERENCE BETWEEN THE GOVERNOR OF A STATE AND OFFICERS OF A STATE OF LOWER GRADES. IN THIS RESPECT THEY ARE UPON A FOOTING OF EQUALITY. Whiteman v. Governor, 5 Ohio St. 528; Houston R. Co. v. Kuechler, Com. etc. Tex."

As we shall see below, this case is regarded subsequently by the Supreme Court as going to the verge of sound doctrine.

In Board of Liquidation v. McComb, 92 U. S. 531, the governor of the state was exofficio one of the members of the board and as such charged by law with certain duties relating to the liquidation of the state indebtedness. The state legislature had enacted legislation affecting the duties of the state board, the carrying out of which would operate to impair the obligation of certain contracts of the state. An injunction was sought in the state court to restrain the Board from carrying out the provisions of this law. The point was made that the court had no jurisdiction, on account of the official position of the defendants. This point was disposed of by the United States Supreme Court, speaking through Justice Bradley, in the following oft quoted language:—

"In our judgment, therefore, the court below was right in granting the injunction as to the consolidated

bonds, if the defendants, occupying the official position they do, are amenable to such a process.

"On this branch of the subject the numerous and well considered cases heretofore decided by this court leave little to be said. The objections to proceeding against state officers by mandamus or injunction are: first, that it is, in effect, proceeding againts the State itself; and, second, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A State, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and WHEN SUCH DUTY IS THREATENED TO BE VIOLATED BY SOME POSITIVE OFFICIAL ACT, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of mandamus and injunction are somewhat correlative to each other. In either case if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void. Osborn v. Bk., 9 Wheat., 859; Davis v. Gray, 16 Wall., 220 (83 U. S. XXI., 453)."

In the great case of U. S. v. Lee (1882) 106 U. S. 196, the action was against officers of the United States, to recover a parcel of land known as the Arlington estate. During the pendency of the case the Attorney General of the United States appeared specially and suggested that the United States was the real party in interest, and insisted

therefore that the court had no jurisdiction in the controversy. In disposing of this objection, the court said:—

> "Notwithstanding the progress which has been made since the days of the Stuarts, in stripping the Crown of its powers and prerogatives, it remains true to-day that the monarch is looked upon with too much reverence to be subjected to the demands of the law, as ordinary persons are, and the king-loving Nation would be shocked at the spectacle of their Queen being turned out of her pleasure garden by a writ of ejectment against the gardener. The Crown remains the fountain of honor, and the surroundings which give dignity and majesty to its possessor are cherished and enforced all the more strictly because of the loss of real power in the government."
>
> "It is not to be expected, therefore, that the courts will permit their process to disturb the possession of the Crown by acting on its officers or agents."
>
> "Under our system the people, who are there called subjects, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. THE CITIZEN HERE KNOWS NO PERSON, HOWEVER NEAR TO THOSE IN POWER OR HOWEVER POWERFUL HIMSELF, TO WHOM HE NEED YIELD THE RIGHTS WHICH THE LAW SECURES TO HIM WHEN IT IS WELL ADMINISTERED. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him, for the protection and enforcement of that right."
>
> "Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense cannot be maintained It seems to be opposed to all the principles, upon which the rights of the citizen, when

brought in collision with the acts of the Government, must be determined. IN SUCH CASES THERE IS NO SAFETY FOR THE CITIZEN, EXCEPT IN THE PROTECTION OF THE JUDICIAL TRIBUNALS, FOR RIGHTS WHICH HAVE BEEN INVADED BY THE OFFICERS OF THE GOVERNMENT, PROFESSING TO ACT IN ITS NAME. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him, when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Chief Justice Marshal says, to examine whether this authority is rightfully assumed, is the exercise of jurisdiction and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption, that the parties setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion."

"But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation?

"In the case supposed, the court has before it a plaintiff capable of suing, a defendant who has no personal exemption from suit and a cause of action cognizable in the court; a case within the meaning of that term, as employed in the Constitution and defined by the decisions of this court. It is to be presumed in favor of the jurisdiction of the court, that the plaintiff may be able to prove the right which he asserts in his declaration."

"It is not pretended, as the case now stands, that the President had any lawful authority to do this, nor that the legislative body could give him any such authority, except upon payment of just compensation.

THE DEFENSE STANDS HERE SOLELY UPON THE ABSOLUTE IMMUNITY FROM JUDICIAL INQUIRY OF EVERYONE WHO ASSERTS AUTHORITY FROM THE EXECUTIVE BRANCH OF THE GOVERNMENT, HOWEVER CLEAR IT MAY BE MADE THAT THE EXECUTIVE POSSESSED NO SUCH POWER. NOT ONLY THAT NO SUCH POWER IS GIVEN, BUT THAT IT IS ABSOLUTELY PROHIBITED, BOTH TO THE EXECUTIVE AND THE LEGISLATIVE TO DEPRIVE ANYONE OF LIFE, LIBERTY, OR PROPERTY WITHOUT DUE PROCESS OF LAW, OR TO TAKE PRIVATE PROPERTY WITHOUT JUST COMPENSATION."

"These provisions for the security of the rights of the citizen stand in the constitution in the same connection and upon the same ground, as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the Government established by that Constitution. As we have already said, the writ of habeas corpus has been often used to defend the liberty of the citizen, and even his life, against the assertion of unlawful authority on the part of the executive and the legislative branches of the Government. See Ex parte Milligan, 4 Wall., 2 (71 U. S. XVIII, 281), and the case of Kilbourn, discharged from the custody of the Sergeant-at-Arms of the House of Representatives by Chief Justice Carter. Kilbourn v. Thompson, 103 U. S. 168, (XXVI., 377)."

"NO MAN IN THIS COUNTRY IS SO HIGH THAT HE IS ABOVE THE LAW. NO OFFICER OF THE LAW MAY SET THAT LAW AT DEFIANCE, WITH IMPUNITY. ALL THE OFFICERS OF THE GOVERNMENT, FROM THE HIGHEST TO THE LOWEST, ARE CREATURES OF THE LAW AND ARE BOUND TO OBEY IT."

"IT IS THE ONLY SUPREME POWER IN OUR SYSTEM OF GOVERNMENT, AND EVERY MAN WHO, BY ACCEPTING OFFICE, PARTICIPATES

IN ITS FUNCTIONS, IS ONLY THE MORE STRONGLY BOUND TO SUBMIT TO THAT SUPREMACY, AND TO OBSERVE THE LIMITATIONS WHICH IT IMPOSES UPON THE EXERCISE OF THE AUTHORITY, WHICH IT GIVES.

"Courts of Justice are established not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government, and the docket of this court is crowded with controversies of the latter class."

Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional, that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without any lawful authority, without any process of law and without any compensation, BECAUSE THE PRESIDENT HAS ORDERED IT AND HIS OFFICERS ARE IN POSSESSION?

"IF SUCH BE THE LAW OF THIS COUNTRY, IT SANCTIONS A TYRANNY WHICH HAS NO EXISTENCE IN THE MONARCHIES OF EUROPE, NOR IN ANY OTHER GOVERNMENT WHICH HAS A JUST CLAIM TO WELL REGULATED LIBERTY AND THE PROTECTION OF PERSONAL RIGHTS."

"It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court: Stop here; I hold by order of the President, and the progress of justice must be stayed. That, though the nature of the controversy is one peculiarly appropriate to the judicial function; though the United States is no party to the suit; though one of the three great branches of the

Government, to which by the Constitution this duty has been assigned, has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen."

"The evils supposed to grow out of the possible interference of judicial action with the exercise of powers of the Government essential to some of its most important operations, will be seen to be small indeed compared to this evil, and much diminished, if they do not wholly disappear, upon a recurrence to a few considerations."

"*Dependent as its courts are for the enforcement of their judgments, upon officers appointed by the Executive and removable at his pleasure, with no patronage and no control of purse or sword, their power and influence rest solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guaranteed by the Constitution and by the laws of the land, and on the confidence reposed in the soundness of their decisions and the purity of their motives.*"

"From such a tribunal no well founded fear can be entertained of injustice to the Government, or purpose to obstruct or diminish its just authority."

In Louisiana v. Jumel, 107 U. S. 711, the cases were mandamus and injunction against various state officers, including the governor, comprising the board of liquidation, to compel them to apply certain funds on hand to the payment of the interest due on the state bonds and to restrain the division of the funds to other purposes. The court, realizing the difficulty, refused to entertain the suits on the ground of jurisdiction and said:—

"Little need be said with special reference to the suit for mandamus. In this no trust is involved; but the simple question presented is, whether a single bond-holder or a committee of bond-holders can, by the

judicial writ of mandamus, compel the executive officers of the State to perform generally their several duties under the law. The relators do not occupy the position of creditors of the State demanding payment from an executive officer charged with the ministerial duty of taking the money from the public treasury and handing it over to them and, on his refusal, seeking to compel him to perform that specific duty. What they ask is that the Auditor of State, the Treasurer of State and the Board of Liquidation may be required to enforce the Act of 1874, and 'Carry out, perform and discharge each and every one of the ministerial acts, things and duties respectively required of them * * * * according to the full and true intent and purport of that Act.' Certainly, no suit begun in the Circuit Court for such relief would be entertained, for that court can ordinarily grant a writ of mandamus only in aid of some existing jurisdiction. Bath Co. v. Amy, 13 Wall., 247 (80 U. S., XX., 540); Davenfort v. Dodge Co., 105 U. S., 242 (XXVI., 1020). Our attention has been called to no case in the state courts of Louisiana in which such general relief has been afforded; and the jurisdiction of the circuit court was, therefore, in no way enlarged through the operation of the removal Acts, even if this is a case which was properly removed, a question we do not deem it necessary now to decide. The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding to which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power

cannot be thus ousted of its jurisdiction and the judiciary set in its place."

In Cunningham v. Railroad (1883) 109 U. S. 446, a bill was filed by Cunningham against the Governor of the State of Georgia and others, including the State Treasurer, in which one of the alternative reliefs prayed for was an injunction against the Treasurer and a discovery against the Governor and Treasurer. The acts of the latter which formed the subject matter of the complaint were done under color of legislative authority. A demurrer to the bill was sustained on the ground of jurisdiction and the bill dismissed. In disposing of this question the whole situation is reviewed and the court said:

"Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government.

"In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him. See, Mitchell v. Harmony, 13 How., 115; Bates v. Clark, 95 U. S., 204 (XXIV., 473); Meigs v. McClung, 9 Cranch, 11; Wilcox v. Jackson, 13 Pet., 498; Brown v. Huger, 21 How., 305 (62 U. S., XVI., 125); Grisar v. McDowell, 6 Wall., 363 (73 U. S., XVIII., 863).

"To this class belongs also the recent case of U. S. v. Lee, for the action of ejectment in that case is, in its essential character, an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment. And the defendants, Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful and, therefore, insufficient as a defense. The judgment in that case did not conclude the United States, as the opinion carefully stated, but held the

officers liable as unauthorized trespassers, and turned them out of their unlawful possession."

In this case, it will be noted that the case of Davis v. Gray, supra, is somewhat criticized but is not overruled. On the contrary, a line of distinction is suggested which in succeeding cases is emphasized and enlarged upon and which finally becomes the jurisdictional test.

The great case of Poindexter v. Greenhow, from which we have quoted at length, supra, throws much light on the general question.

In Hagood v. Southern, 117 U. S. 52, 70, the line of demarcation between such cases as Louisiana v. Jumel, Cunningham v. Railroad, and U. S. v. Lee, Poindexter v. Greenhow, Board of Liquidation v. McComb, and Davis v. Grey, is pointed out as follows:—

> "A broad line of demarcation separates from such cases as the present, in which the decrees require, *by affirmative official action* on the part of the defendants, the performance of an obligation which belongs to the State *in its political capacity*, those in which actions at law or suits in equity are maintained against defendants who, *while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiffs, under color of authority, unconstitutional and void.* Of such actions at law for redress of the wrong, it was said by Mr. Justice Miller, in Cunningham v. Macon & Brunswick R. R. Co., ubi supra: 'In these cases he is not sued as or because he is the officer of the government, but as an individual; and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him.' Of such cases that of U. S. v. Lee, 106 U. S. 196 (Bk. 27 L. ed. 171), is a conspicuous example; and it was upon this ground that the judgment in Poindexter v. Greenhow, 114 U. S. 270 (ante, 185), was rested.

AND SO THE PREVENTIVE REMEDIES OF EQUITY, BY INJUNCTION, MAY BE EMPLOYED IN SIMILAR CASES TO ANTICIPATE AND PREVENT THE THREATENED WRONG, WHERE THE INJURY WOULD BE IRREPARABLE, AND THERE IS NO PLAIN AND ADEQUATE REMEDY AT LAW, AS WAS THE CASE IN ALLEN V. B. & O. R. R. CO., 114 U. S. 311 (ANTE, 200), WHERE MANY SUCH INSTANCES ARE CITED."

In Hans v. Louisiana (1889), 134 U. S. 1, the same distinction is suggested as follows:—

> "To avoid misapprehension it may be proper to add that, although the obligations of a State rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the state consents to be sued, or comes itself into court, yet where property or rights are enjoyed under a grant or contract made by a state, *they cannot wantonly be invaded.* Whilst the state cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts, *may be judicially resisted*; and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment."

In Pennoyer, et al., v. McConnaughy, 140 U. S. 1, the bill was in equity against the governor, secretary, and treasurer of the state of Oregon to restrain them from selling a large amount of swamp land in that state to which plaintiff asserted title. In overruling the objection as to jurisdiction, the court, after reviewing the situation, again points out the true line of distinction between such cases as Davis v. Gray, supra, and Cunninghan v. Railroad, supra, as follows:—

> "Little remains to be done or said by us in this connection, except to apply the principles announced in the cases we have attempted to review to the facts in the cases before us, as set forth in our introductory statement. In this connection it must be borne in mind that this suit is not nominally against the

> governor, secretary of state and treasurer, as such officers, but against them collectively, as the board of land commissioners. It must also be observed that the plaintiff is not seeking *any affirmative relief* against the State or any of its officers. He is not asking that the State be compelled to issue patents to him for the land he claims to have purchased, nor is he seeking to compel the defendants to do and perform any acts in connection with the subject matter of the controversy requisite to complete his title. All that he asks is, that the defendants *may be restrained and enjoined* from doing certain acts which he alleges are violative of his contract made with the state when he purchased his land. He merely asks that an injunction may issue against them to restrain them from acting under a statute of the state alleged to be unconstitutional, which acts will be destructive of his rights and privileges, and will work irreparable damage and mischief to his property rights. The case cannot be distinguished, in principle, from Osborn v. Bank of United States, Davis v. Gray, Louisiana Board of Liquidation v. McComb and Allen v. Baltimore & O. R. Co., cited above and the reasoning in those cases applies with equal force in this."

In Reagan v. Farmer's Loan Co., 154 U. S. 362, the language in the foregoing cases is repeated and the distinction reiterated.

In Belknap v. Schild, 161 U. S. 10, the same principle is laid down in the following language:—

> "The extent to which officers or agents of the government may be restrained by injunction from doing unlawful acts to the prejudice of private rights is illustrated by the decisions of this court regarding injunctions from the courts of the United States to officers and agents of a state, which, by the Constitution of the United States, is as exempt as the United States are from private suit. Hans v. Louisiana 134 U. S. 1.

"In a suit to which the state is neither formally nor really a party, its officers, although acting by its order and for its benefit, may be *restrained* by injunction, when the remedy at law is inadequate, from doing *positive acts* for which they are personally and individually liable, taking or injuring the plaintiff's property, *contrary to a plain official* duty requiring no exercise of discretion and in violation of the Constitution or laws of the United States. Osborn v. Bank of United States, 22 U. S. 9 Wheat. 738, 868, 871; Louisiana Board of Liquidation v. McComb, 92 U. S. 531, 541; Allen v. Baltimore & O. R. Co. 114 U. S. 311; Pennoyer v. McConnaughy, 140 U. S. 1.

"But no injunction can be issued against officers of a state, to restrain or control the use of property already in the possession of the state, or money in its treasury when the suit is commenced; or to compel the state to perform its obligations; or where the state has otherwise such an interest in the object of the suit as to be a necessary party. Louisiana v. Jumel, and Elliott v. Wiltz, 107 U. S. 711, 720-728; Cunningham, v. Macon & B. R. Co., 109 U. S. 446, 454-457; Hagood v. Southern, 117 U. S. 52, 70; Re Ayers, 123 U. S. 443; North Carolina v. Temple, 134 U. S. 22; McGahey v. Virginia, 135 U. S. 662, 684."

These cases, we believe, mark the true limits beyond which the courts may not go in interfering with the official acts of executive officers. There is no distinction made in these cases between the Chief Executive of the State and the other executive officers thereof. We see no reason which would require the application of different principles in the case of the President of the United States. As a matter of fact, the Supreme Court of the United States has, on several occasions, upheld its jurisdiction to restrain cabinet officers from the performance of illegal acts resulting in the invasion of private rights. As we saw in Marbury v. Madison, supra, the assertion of jurisdiction went so far as to compel the performance of a ministerial duty. In Noble v. Union Logging

River Co. 147 U. S. 164, 171, 172, it was held that an injunction would issue to restrain the Secretary of the Interior from doing an unauthorized official act which would result in depriving the plaintiff of its property without due process of law. The court said:

> "We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the head of a department, under any view that could be taken of the facts that were laid before him, was ultra vires, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus, if he refused to do an act which the law plainly required him to do."

And in the late case of Garfield v. U. S. ex rel. Goldsby (1908) 211 U. S. 249, the cases of Marbury v. Madison, supra, and Noble v. Logging River Co., supra, are quoted with approval and it is held that a writ of mandamus will issue to compel the Secretary of the Interior to undo his action in summarily erasing from the approved rolls of citizenship in the Choctaw and Chickasaw Nations the name of one who had received an allotment certificate and was in possesion of the land, on the ground that the action of the Secretary of the Interior was without authority and operated to deprive the petitioner of his property without due process of law.

The case of Mississippi v. Johnson, 71 U. S. 437, which has been very confidently relied upon as establishing the want of jurisdiction in this case, is not an authority for that position. The court, in that case, was very careful to limit its application as follows:

> "We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues discussed in argument whether, in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive

law, or may be held amenable in any case, otherwise than by impeachment for crime."

Then too, the doctrine in that case must be regarded as modified by the subsequent case of Georgia v. Stanton, et al., 73 U. S. 50, in which practically the same situation presented itself and the injunction was refused, not on the grounds stated in the Johnson case, but on the ground that the bill prayed for the protection of political rights and that such rights are not within the power of a court of equity to protect.

We believe, therefore, that it is accurate to say that the courts will interfere with the executive department to restrain the execution of unauthorized official acts, the execution of which would result in an invasion of individual rights. That on the other hand they will refuse to grant affirmative relief against such officers, in any but perhaps their their simplest ministerial duties, even tho the law expressly enjoins the performance of such duties and even though the non-compliance therewith on the part of the executive result in an invasion of private rights—the reason being that the courts in such cases are powerless to substitute themselves for the executive department or to undertake the supervision thereof.

This distinction explains away much apparent conflict in the state cases. In the leading case of Sutherland v. Governor, 29 Mich. 320, the relief sought was affirmative official action on the part of the respondent Governor. The same was true in Hawkins v. Governor, 1 Ark. 570, Bates v. Taylor (Tenn.) 11, S. W. 266, People v. Bissell, 19 Ill. 229, and in Severino v. Governor General, VIII, Phil. Official Gazette 1171. As we have seen, these cases cannot be regarded as authorities against the assumption by the courts of jurisdiction to restrain unauthorized official acts of an affirmative character on the part of the executive resulting in an invasion of individual rights. In other words, the courts may be powerless to compel the chief executive to perform a duty imposed upon him by law, the non-performance of which will work private injury, but they are not powerless to restrain him from perform-

ing an act prohibited or unauthorized by law, the performance of which will work private injury. They cannot supply or compel the executive to supply an official omission, but they can prevent positive official action unwarranted by law and resulting in private wrong.

ARE OUR CHIEF EXECUTIVE AND HIS SUBORDINATES WHO PARTICIPATED IN THE ACTS SET FORTH IN OUR STATEMENT OF FACTS SUBJECT TO THE PAYMENT OF DAMAGES FOR THOSE ACTS?

We have seen that the acts of the Governor-General and his subordinates set forth in our statement of facts can in no way be regarded as the acts of the State. Indeed, as we have seen, they were executed against the express will of the sovereign in the Philippines, as expressed in the organic law whereby our local government was created. We have seen that our Chief Executive, and persons, acting under him, may be restrained by the courts from repeating the deportations set forth in our statement of facts. We now propose to discuss the question whether or not our Chief Executive and the persons acting under him, may be mulcted in damages for the former deportation.

The case of Little v. Barreme, 2 Cranch. 170, was a case wherein the commander of a ship of war of the United States had obeyed certain orders or instructions emanating from the President of the United States, which were not strictly warranted by law. The Supreme Court of the United States, speaking thru Chief Justice Marshal, said:—

> "These orders given by the executive under the construction of the act of Congress made by the department to which its execution was assigned, enjoin the seizure of American vessels sailing from a French Port. Is the officer who obeys them liable for damages sustained by this misconstruction of the act, or will his orders excuse him? If his instructions afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him; if they excuse an act not otherwise

excusable, it would then be necessary to inquire whether this is a case in which the probable cause which existed to induce a suspicion that the vessel was American, would excuse the captor from damages when the vessel appeared in fact to be neutral.

I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. *But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass.*"

In Tracy et al. v. Swartwout, 10 Peters (U. S.) 80, the point before the court for consideration was the right of the plaintiffs to recover damages from the defendant who, as Collector of Customs, had refused to allow the plaintiff to enter and receive the payment of the lawful duties on certain casks of sirup of sugar-cane which they had imported into the

port of New York. It was admitted all through the case that the defendant had acted with entire good faith, and under instructions emanating from his superiors in the Treasury Department. The court held the defendant liable, and in refusing to regard these instructions as any defense whatsoever, stated:—

> "The Collector of the Customs is a ministerial officer; he acted under the instructions of the Secretary of the Treasury, who is expressly authorized to give instructions, as to the due enforcement of the revenue laws.
>
> "Do these instructions, when not given in accordance with the law, afford a justification to the collector, or exonerate him from the payment of adequate damages for an injury resulting from his illegal acts?
>
> "The Circuit Court in their charge to the jury, did not consider these instructions as a justification to the defendant; and in this they were unquestionably correct.
>
> "The Secretary of the Treasury is bound by the law, and although in the exercise of his discretion he may adopt necessary forms and modes of giving effect to the law, yet, neither he nor those who act under him, can dispense with, or alter any of its provisions. *It would be a most dangerous principle to establish that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress.* The facts of the case under consideration will forcibly illustrate this principle. The importers offer to comply with the law by giving bond for the lawful rate of duties; but the collector demands a bond in a greater amount than the full value of the cargo. The bond is not given, and the property is lost, or its value greatly reduced, in the hands of the defendant. Where a ministerial officer acts in good faith for an injury done, he is not liable to exemplary damages; but he can

claim no further exemption where his acts are clearly against law."

In the case of Belknap v. Schild, 161 U. S. 18, the question before the Supreme Court of the United States was as to the liability of officers or agents of the United States, although acting under its orders, to be sued for their infringement of a patent. One of the defendants was a commodore in the United States Navy and commandant of the United States Navy Yard at Mare Islands, California. Among the defendants was a civil engineer in the Navy and an assistant naval contractor in the Navy and an employee of the United States at Mare Island. The Supreme Court, speaking thru Mr. Justice Gray, said:—

> "But the exemption of the United States from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the United States. Little v. Barreme, 6 U. S. 2 Cranch, 170; Bates v. Clark, 95 U. S. 204. Such officers, or agents, although acting under order of the United States, are therefore personally liable to be sued for their own infringement of a patent. Cammeyer v. Newton, 94 U. S. 225, 235. See also Feather v. Queen, 6 Best & S. 257, 297; Vavasseur v. Krupp, L. R. A. 9 Ch. Div. 351, 355, 358."

In the case of Bates vs. Clarke, 95 U. S. 204, the question before the court was whether or not the defendants, a captain and a lieutenant in the United States Army, acting under an order of the commanding officer of the Department of the Dakotas, for which there was no authority, were liable in damages to the owners of certain liquors for the seizing of the same. The court held them liable, and made use of the following language:—

> "It is a sufficient answer to the plea, that the defendants were subordinate officers acting under orders of a superior, to say that whatever may be the

rule in time of war and in the presence of actual hostilities, military officers can no more protect themselves than civilians in time of peace, by orders emanating from a source which is itself without authority. The authority of the commandant of the post in the case was precisely the same as the Indian agent or sub-agent, or superintendent; and it will hardly be maintained that if either of them, wholly mistaking their powers, had seized the goods, he would have incurred no liability.

So the plea, that they had good reason to believe that this was Indian country and that they acted in good faith, while it might excuse these officers from punitory damages, is no defense to the action. If it had been Indian country, and it had turned out that the plaintiffs had a license or did not intend to sell or introduce the goods, the fact that defendants acted on reasonable ground would have exempted them from liability.

But the objection fatal to all this class of defenses is that in that locality they were utterly without any authority in the premises; and their honest belief that they had is no defense in their case more than in any other, where a party mistaking his rights commits a trespass by forcibly seizing and taking away another man's property.

There was here no process from a competent court, nor any order from any source having authority, and there is, therefore, no defense."

In Mitchell v. Harmony, 13 Howard 115, the court held a military officer in damages for a trespass committed by him by order of his superior.

In Cunningham v. Macon R. R. Co., supra, we found the court saying:—

"Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government.

In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him. See Mitchell v. Harmony, 13 How., 115; Bates v. Clark, 95 U. S., 204; Meigs v. McClung, 9 Cranch, 11; Wilcox v. Jackson, 13 Pet., 498; Brown v. Huger, 21 How., 305; Grisar v. McDowell, 6 Wall., 363.

To this class belongs also the recent case of U. S. v. Lee for the action of ejectment in that case is, in its essential character, an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment. And the defendants, Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful and, therefore, insufficient as a defense. The judgment in that case did not conclude the United States, as the opinion carefully stated, but held the officers liable as unauthorized trespassers, and turned them out of their unlawful possession."

In England, the authorities are abundant to the same effect.

In the case of Ferguson v. Earl of Kinnoul, (1842) 9 Clarke and Fin. H., page 251, a notable case before the House of Lords, it was held with unanimity that "If the law casts any duty upon a person which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures," and also that "persons having judicial functions but being also required to perform ministerial acts, may be sued for damages occasioned by their neglect or refusal to perform such ministerial acts."

There was also a case before the Privy Council in 1860, Rogers v. Dutt (13 Moore's P. C. R., page 236) on appeal from the Supreme Court of Calcutta, in an action brought against a public officer for a wrougful act *officially* done. The

opinion was prepared by Sir John Taylor Coleridge and was read by Dr. Lushington, in which it was said:

> "If the act which he (the defendant) did was in itself wrongful as against the plaintiffs, and produced damages to them, they must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorized, or whether it was done by the order of the superior power. THE CIVIL IRRESPONSIBILITY OF THE SUPREME POWER FOR TORTIOUS ACTS COULD NOT BE MAINTAINED WITH ANY SHOW OF JUSTICE IF ITS AGENTS WERE NOT PERSONALLY RESPONSIBLE FOR THEM; in such cases the government is morally bound to indemnify its agent, and it is hard on such agent when this obligation is not satisfied; BUT THE RIGHT TO COMPENSATION IN THE PARTY INJURED IS PARAMOUNT TO THIS CONSIDERATION."

Another remarkable case is that of Lieutenant Colonel Dickson v. The Secretary for War, the Lord Lieutenant commanding a military district, and his own Colonel in the Queen's Bench in 1863, where the suit was for damages "for causing, by means of false charges the removal of the plaintiff from the office of Lieutenant Colonel of the Regiment." All of the officers who were made parties defendants were called as witnesses and in the course of the trial, and while the Secretary for War was in the witness box, Lord Chief Justice Cockburn asked him the following question:

> "Was there any personal influence used, or sought to be used, upon you, to make you depart from the ordinary course?"

Upon being answered in the negative, the Lord Chief Justice then said:

> "I shall tell the jury that if they believe that his intention was to oppress and injure the plaintiff, he is liable; but that if he made the recommendation to dismiss him out of an honest sense of duty, even though he may have been mistaken he is not liable in law."

In a case before the same high court in 1865, Feather v. The Queen, 6 Best & Smith's Q. B. R., 257 counsel took the position that there could be no remedy by action against an officer of State for an injury done by authority of the Crown, and the same Lord Chief Justice, after distinguishing the case of Baron v. Denman, relied upon, stated:—

> "The decision leaves the question as to the right of action between subject and subject wholly untouched. On the other hand, the case of the general warrants, Money v. Leach, (1 T. R. p. 493) and the cases of Sutton v. Johnson, (3 Burr., p. 1742) and Sutherland v. Murry, (1 T. R., p. 598) there cited, are direct authorities that an action will lie for a tortious act notwithstanding it may have had the sanction of the highest authority in the state. But, in our opinion, no authority is needed to establish that a servant of the Crown is responsible in law for a tortious act done to a fellow subject, though done by the authority of the Crown—a position which appears to us to rest upon principles which are too well settled to admit of question, and which are alike essential to uphold the dignity of the Crown on the one hand and the rights and liberties of the subject on the other."

On principle, if we have in reality a government of laws and not of men, there can be no distinction where the trespassing party is the Chief Executive. His position is not analogous to that of a legislator or judge. When he acts without authority of law, he becomes a trespasser. Not so the other two. There is plenty of authority to the effect that a chief executive is responsible in damages for his unauthorized official acts resulting in injury to third persons, and none to the contrary. In the absence of a clear determining case, we believe no such distinction should be initiated as there is no real reason for it.

In Mostyn vs. Fabrigas, reported in 1 Cowp. R., page 150, a case tried 140 years ago, the governor of Minorca had illegally imprisoned and banished an inhabitant of Minorca.

He was sued in trespass and an English jury cast him in 3,000 pounds damages, and the Court of King's Bench, with Mansfield at its head, sustained the verdict.

In this case Lord Mansfield said:—

"It has been insisted by way of distinction that, supposing an action will lie for an injury of this kind committed by one individual against another, in a country beyond the seas, but within the dominion of the crown of England, yet it shall not emphatically lie against the governor, IN ANSWER TO WHICH I SAY, THAT FOR MANY REASONS, IF IT DID NOT LIE AGAINST ANY OTHER MAN, IT SHALL MOST EMPHATICALLY LIE AGAINST THE GOVERNOR."

* * * * * * * * * * * * * * * * *

"THEREFORE TO LAY DOWN IN AN ENGLISH COURT OF JUSTICE SUCH A MONSTRUOUS PROPOSITION, AS THAT A GOVERNOR ACTING BY VIRTUE OF LETTERS PATENT UNDER THE GREAT SEAL IS ACCOUNTABLE ONLY TO GOD AND HIS OWN CONSCIENCE, THAT HE IS ABSOLUTELY DESPOTIC, AND CAN SPOIL, PLUNDER, AND AFFECT HIS MAJESTY'S SUBJECTS BOTH IN THEIR LIBERTY AND PROPERTY WITH IMPUNITY, IS A DOCTRINE THAT CANNOT BE MAINTAINED."

"In Lord Bellamonts case, 12 Salk. 625, cited by Mr. Peckham, a motion was made for a trial at bar and granted because the Attorney General was to defend it on the part of the King; which shows that such an action existed. And in Way v. Yally, 6 Mod. 195, Justice Powell says that an action of false imprisonment has been brought here against a governor of Jamaica for an imprisonment there, and the laws of the country were given in evidence. The Governor of Jamaica in that case never thought he was not amenable. * * * * * I remember early in my time, being counsel

.n an action brought by a carpenter in a train of artillery against Governor Sabina, who was governor of Gibraltar and who had barely confirmed the sentence of a court martial, by which the plaintiff had been tried and sentenced to be whipped. The governor was very ably defended, but nobody ever thought the action would not lie; and it being proved at the trial that the tradesmen who follow the train are not liable to martial law, the court were of that opinion and the jury accordingly found the defendant guilty of the trespass, as having had a share in the sentence, and gave 500 pounds damages."

In Glynn vs. Houston, 2 Manning and Granger's Com. Pls. R. page 337, the governor of Gibraltar had sent a company of soldiers to search for a Spanish general, secreted in a certain house. An English merchant, in an adjoining house, coming to his own door was stopped by a sentry's bayonet and compelled to remain within till the search was over. The merchant brought his action for this constructive assault of the governor by the sentry and this imaginary invasion of an Englishman's castle by compelling the owner to remain within it for a few moments and an English jury fined the Governor 50 pounds. On a motion for a new trial, all the judges of the Common Pleas held that the action would lie, and that the verdict should stand.

In Brown v. U. S., 6 Ct. of Claims, 171, that court reviewed the situation under the English authorities and waxed sarcastic in rejecting the theory that executive officers are exempt from the payment of damages for their tortious acts. For example, in opening this review of authorities, the court said:—

"In our own country there has grown up such a belief in the divine right of public officers, so nearly resembling all that was ever believed of the divine right of Kings, that it is vain to look for more than one personal action brought against a high officer of State. (Stokes vs. Kendall; 14 Pet.) In England the highest have never been deemed higher than the

law; and to the English courts we must turn with profit to learn to what extent great public functionaries are amenable in courts of justice at the suit of injured citizens."

And after reviewing the old case in Cowper, mentioned above, the court said;

"So the divine right of governors was disposed of, even as against a poor Minorcan, only by treaty made a subject of Great Britain."

And after reviewing Glynn vs. Houston, supra, the court said:—

"WHEREFORE, THE DIVINE RIGHT OF GOVERNORS TO DO UNLAWFUL ACTS MAY BE CONSIDERED NOW, AS IN GREAT BRITAIN, ENTIRELY AT AN END."

And after terminating its review of the English authorities on this phase of the case, that court said:

"Therefore, it appears, by the concurrent opinion of all the judges of the six great courts of Great Britain—the Exchequer, the Common Pleas, the Queen's Bench, Chancery, the Privy Council and the House of Lords—that it is a fundamental principle that every British subject who has suffered a legal wrong shall have legal redress against some one; A LOFTY GROUND TO BE MAINTAINED, BUT THE ONLY GROUND TO STAND UPON IF VESTED RIGHTS ARE TO BE SECURED OR LAWS ARE TO PREVAIL OVER MEN."

After this review of authorities the court reaches the conclusion that an action at law will lie against the Secretary of the Treasury.

In Moyer v. Peabody, supra, wherein an action for damages for false imprisonment had been filed against the governor of the state, the point was never suggested that the chief executive was exempt from the payment of damages for wrongful acts committed by him while acting officially. On the contrary, the defendants expressly admitted that if they

acted beyond authority of law — beyond all color of law— they acted and could have acted only as individuals and their action was not the action of the State.

The case of Kilbourn v. Thompson, 103 U. S. 168, presents the same question in an interesting light. The plaintiff had been imprisoned by defendant Thompson as sergeant at arms of the House of Representatives under orders therefrom, the other defendants being members thereof. The imprisonment was for an alleged contempt because of disobedience by the plaintiff of an order which the House had no power to make. The defendants who were members, and who had voted for the arrest of plaintiff were held exempt from responsibility only on the ground of their constitutional privilege against being questioned in any other place for any speech or debate while in the House. Their activity in securing plaintiff's arrest was regarded as within this privilege. The Sergeant at Arms, Thompson, was held answerable in damages for the false imprisonment.

See also 1 Hare's American Constitutional Law 139-144.

We believe that these cases show that the Governor-General, as well as his subordinates, are answerable to the Chinese deportees for the damages the latter have suffered by reason of their wrongful deportation.

Not only is this the law but this must be the law, otherwise private individuals could obtain no protection whatsoever against the unlawful acts of public officers. It is true that when a public officer proceeds within the scope of his authority, be it discretional or be it ministerial, that authority is a complete defense to him in any action for damages to individuals caused by the exercise of that authority. But when the authority does not exist, the mere fact that the actor is a public official can be no defense in so far as the act complained of is concerned. It is not an act of the State itself but an act of the official in his individual capacity and he is responsible in exactly the same manner and to exactly the same degree as any other member of society for the damages caused by his wrongful act.

In closing we believe we are justified in saying that our Chief Executive, in carrying out the deportations set forth in our statement of facts, was guilty of an arbitrary act which finds no parallel in the history of American territorial administration. We did not believe it possible in the beginning of the Twentieth Century, that an executive officer of an American territory, acting under the commission of the people of the United States, should lay claim to such arbitrary power—a claim of irresponsible power which smacks of the pretensions of the Plantagenets and of the Stuarts. To the average American, be he lawyer or be he layman, the proposition that the Chief Executive of these Islands, in time of peace, has the power to tear from their homes, from their families and from their friends alien inhabitants hereof who have become part and parcel of the population, who have married here and who have their social and business interests here, without notice or hearing and without warrant of published laws of general applicability and equal operation, is abhorrent, impossible and un-American. As the Supreme Court of the United States said, "No such arbitrary power can exist where the principles involved in due process of law are recognized."

We can not do better in closing this argument, than to quote the ringing words of Pitt at the trial of Warren Hastings upon the question of arbitrary power:—

> "Will your lordships submit to hear the corrupt practices of mankind made the principles of government? He have arbitrary power;—my lords, the East India Company have not arbitrary power to give him; the king has no arbitrary power to give him; your lordships have not; nor the Commons; nor the whole Legislature.
>
> We have no arbitrary power to give, because arbitrary power is a thing which neither any man can hold nor any man can give. No man can lawfully govern himself according to his own will—much less can one person be governed by the will of another. We are all born in subjection—all born equally, high and low, governors and governed, in subjection to one,

great, immutable, preexistent law, prior to all our devices, and prior to all our contrivances, paramount to all our ideas and to all our sensations, antecedent to our very existence, by which we are knit and connected in the eternal frame of the universe, out of which we can not stir.

This great law does not arise from our conventions or compacts; on the contrary, it gives to our conventions and compacts all the force and sanction they can have: it does not arise from our vain institutions. Every good gift is of God, all power is of God; and He who has given the power, and from whom alone it originates, will never suffer the exercise of it to be practised upon any less solid foundation than the power itself.

If, then, all dominion of man over man is the effect of the divine disposition, it is bound by the eternal laws of Him that gave it, with which no human authority can dispense; neither he that exercises it, nor even those who are subject to it; and, if they were mad enough to make an express compact, that should release their magistrate from his duty, and should declare their lives, liberties and properties dependent upon, not rules and laws, but his mere capricious will, that covenant would be void.

This arbitrary power is not to be had by conquest. Nor can any sovereign have it by succession; for no man can succeed to fraud, rapine, and violence. Those who give and those who receive arbitrary power are alike criminal; and there is no man but is bound to resist it to the best of his power, wherever it shall show its face to the world.

Law and arbitrary power are in eternal enmity. Name me a magistrate, and I will name property; name me power, and I will name protection. It is a contradiction in terms, it is blasphemy in religion, it is wickedness in politics, to say that any man can have arbitrary power. In every patent of office the duty is included. For what else does a magistrate

exist? To suppose for power, is an absurdity in idea. Judges are guided and governed by the eternal laws of justice, to which we are all subject. We may bite our chains, if we will; but we shall be made to know ourselves, and be taught that man is born to be governed by *law*; and he that will substitute *will* in the place of it is an enemy to God."

C. A. DEWITT.

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